TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 144.

B. F. THOMPSON, APPELLANT,

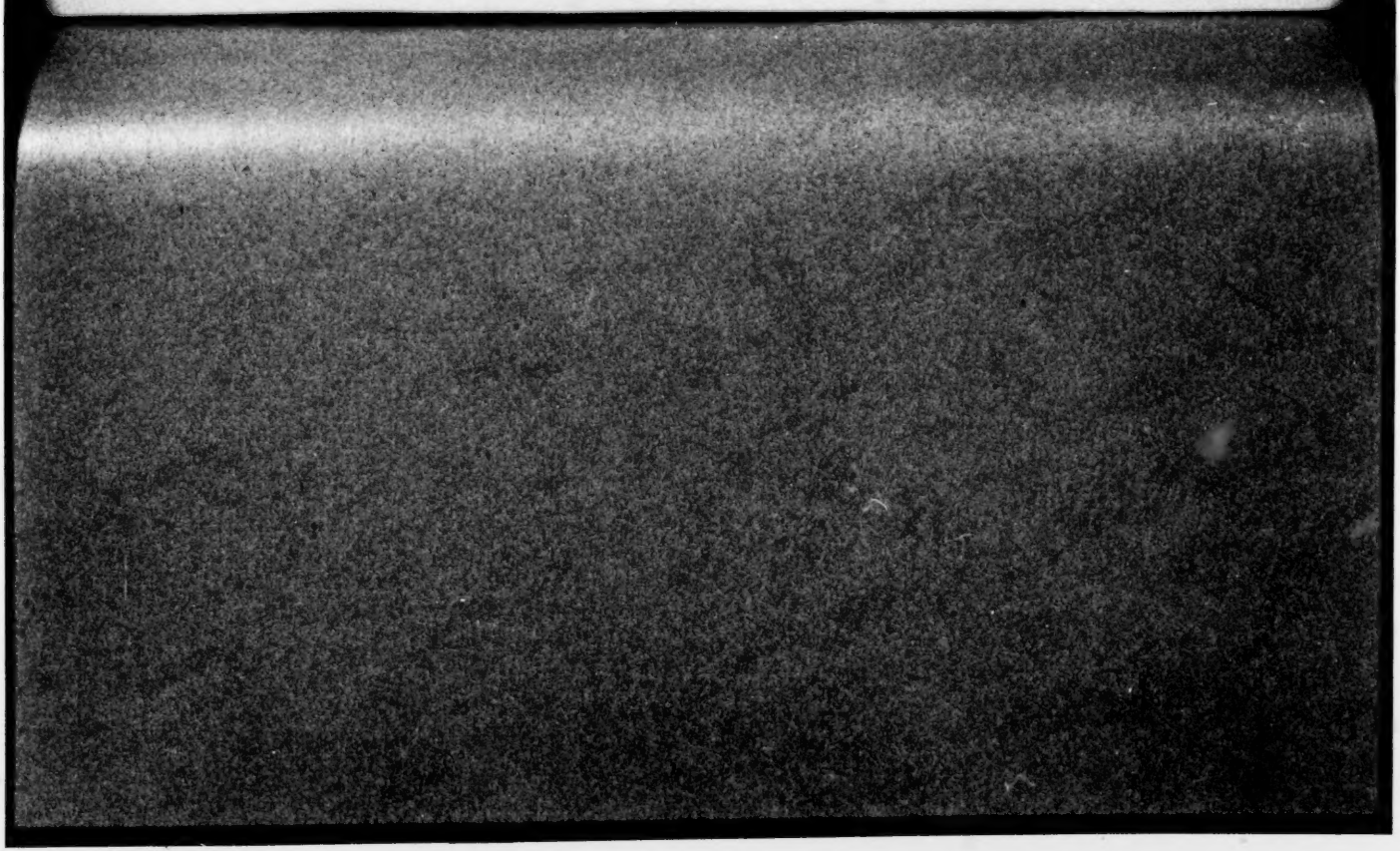
vs.

O. M. FERRY, SIMON J. MURPHY, AND CHARLES C. BOWEN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED OCTOBER 24, 1900.

(12,636.)



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INDEX.

	Original.	Print.
Transcript from the district court	1	1
Complaint	1	1
Answer	4	2
Amended answer	5	3
Plaintiff's answer to cross-complaint	24	12
Amended complaint	34	17
Decree	46	23
Judgment-roll certificate	49	25
Motion for new trial	50	25
Order granting time to answer	51	26
Orders setting cause	52	26
Order setting demurrer for hearing	53	27
Order overruling demurrer	53	27
Order beginning hearing	54	27
Order submitting cause	55	28
Order for judgment, appeal, &c	56	28
Reporter's transcript	57	29
Offers by plaintiff	58	29
Testimony of Marcellus E. Collins	65	33
Further offers by plaintiff	69	35
Testimony of T. W. Johnston	72	37

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 2, 1900.

	Original.	Print.
Offers by defendants	76	38
Testimony of G. W. Vickers	81	41
Further offers by defendants	84	42
Testimony of M. E. Collins (recalled)	90	45
Jesse Robinson	110	56
J. F. Foster	121	62
Jesse A. Robinson (recalled)	122	62
J. F. Foster (resumed)	122	62
J. R. Lowry	129	66
Dr. G. W. Vickers (recalled)	139	72
M. E. Collins (recalled)	149	77
Index to offers, &c	151	77
Appendix—Deeds, &c	152½	79
Deed, Russell to Lane and Howell, October 24, 1882	153	79
Deed, Russell to Collins, October 25, 1882	156	80
Deed, Collins to Roberts, October 25, 1883	159	82
Deed, Lane to Collins, November 14, 1883	163	84
Deed, Collins to Schofield, November 14, 1883	166	85
Deed, Howell to Collins, November 16, 1880	169	87
Deed, Collins to Thompson, August 18, 1884	172	88
Complaint in Roberts *vs.* Collins *et al.*	175	90
Exhibit A—Deed, Collins to Roberts, October 25, 1883	181	93
Judgment in Roberts *vs.* Collins *et al.*	185	95
Sheriff's certificate of sale	191	97
Sheriff's deed to Roberts, September 30, 1887	194	99
Deed, Lowry to Dickey, July 20, 1891	199	101
Reporter's certificate	204	103
Index to testimony	205	104
Decision	206	104
Cost bond on appeal	223	112
Clerk's certificate	226	114
Assignment of errors	231	116
Order setting cause for hearing	232	116
Hearing and submission	232	117
Judgment	232	117
Minute entries	232	117
Opinion	233	117
Motion for rehearing	246	123
Order denying motion for rehearing	254	127
Notice of appeal	254	127
Petition for and allowance of appeal	255	127
Affidavit of value	257	128
Appeal cost bond	258	129
Statement of facts	261	130
Assignment of errors	263	131
Clerk's certificate	267	133
Citation	268	133
Proof of service of citation	269	134

1 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

B. F. THOMPSON, Plaintiff, vs. D. M. FERRY, SIMON J. MURPHY, and Charles C. Bowen, Defendants.	No. 2618. Complaint Filed October 6th, 1896, at 4 o'clock p. m. A. J. Herndon, Clerk, by Wm. Wilkerson, Deputy.

Complaint.

Comes now the above-named plaintiff and for first cause of action alleges:

I.

That plaintiff is a resident of the county of Clark, in the State of Wisconsin, and that the defendants are residents of the city of Detroit, in the State of Michigan.

II.

That the said plaintiff is and for a long time heretofore has been the owner of an undivided one-half interest in and to that certain mining claim situate, lying, and being in the Big Bug mining district, Yavapai county, Arizona Territory, known and described as follows, to wit:

The Poland mining claim, located on the 2nd day of August, 1875, by B. R. Poland, notice of which said location is of record in Book C 3 of Mines, at pages 309 and 310, of records of Yavapai
2 county, Arizona, and to which said notice and the record thereof, as aforesaid, reference is hereby made for more particularity of description of said mining claim.

That the said plaintiff claims title, as aforesaid, in said premises.

That the said defendants claim an estate or interest therein adverse to the said plaintiff.

That the claim of said defendants is without any right whatsoever, and said defendants have no right, title, or interest whatever in plaintiff's interest in said mining claim or premises or any part thereof.

2.

And for a second separate and other cause of action said plaintiff alleges:

I.

That the plaintiff is a resident of the county of Clark, in the State of Wisconsin, and that the defendants are residents of the State of Michigan and the city of Detroit.

II.

That the said plaintiff is and for a long time heretofore has been the owner of an undivided one-half interest in and to that certain mining claim situate, lying, and being in the Big Bug mining dis-

trict, Yavapai county, Arizona Territory, known and described as follows, to wit:

3 The Hamilton mining claim, located on the 28th day of September, 1875, by Wm. Gavin, notice of which said location is of record in Book C 3 of Mines, page 416, records of Yavapai county, Arizona, to which said location notice and the record thereof reference is hereby had and made for more particularity of description, and the same is made a part hereof.

That the plaintiff claims title, as aforesaid, in said mining claim and premises.

That the said defendants claim an estate or interest therein adverse to this plaintiff.

That the claim of said defendants is without any right whatsoever, and said defendants have no right, title, or interest whatever in plaintiff's interest in said mining claim or premises or any part thereof.

Wherefore plaintiff prays that the said defendants may be required to set forth the nature of their claim in and to plaintiff's said interest in said mining claims and each of them and every part thereof.

That all adverse claims of the said defendants may be determined by a decree of this court.

That by said decree it be declared and adjudged that the defendants have no right, title, estate, claim, or interest whatever in and to plaintiff's said interest in said mining claims and premises or either of them or any part thereof, and that the title of plaintiff thereto is good and valid.

4 That the defendants be forever enjoined from asserting any claim whatever in and to plaintiff's said interest in said mining claims and premises or either of them or any part thereof adverse to said plaintiff, and that plaintiff recover his costs herein sustained, and for such other, further, and different relief as the court may deem meet and proper in equity.

ROBT E. MORRISON,
J. E. MORRISON,
Attorneys for Plaintiff.

In the District Court of Yavapai County, Arizona Territory.

B. F. THOMPSON, Pl'ff, } Answer. Filed December 2nd, 1896.
vs.
D. M. FERRY, S. J. MURPHY, ET ALS., Def'ts. } ——— ———, Clerk.

Comes now said defendants, and, by way of answer to plaintiff's complaint herein, demur thereto, and for cause of demurrer allege:

That, as appears upon the face of said complaint, it does not state facts sufficient to constitute a cause of action.

Wherefore defendants pray judgment of the court whether they shall be required to answer any further, and that they be hence dismissed with their costs.

T. W. JOHNSTON,
Attorney for Defendants.

Service of a copy of the above answer acknowledged this 2nd day of December, 1896, which answer is filed within the time heretofore herein stipulated between the parties to this suit, which stipulation was made an order of the court on the minutes thereof.

ROB'T E. & J. E. MORRISON,
Attorneys for Plaintiff.

In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

B. F. THOMPSON, Plaintiff, vs. D. M. FERRY, SIMON J. MURPHY, and Charles C. Bowen, Defendants.	Amended Answer. Filed May 7th, 1897, at 11 o'clock a. m. A. J. Herndon, Clerk, by Wm. Wilkerson, Deputy. Service of Copy of within Acknowledged May 7th, 1897. Morrison & Morrison, Att'ys for Pl'ff.

Come now the said defendants, and each of them in this their amended answer to plaintiff's complaint herein, by way of demurrer thereto, allege:

I.

That, as appears upon the face of said complaint, it does not state facts sufficient to constitute a cause of action, in this, to wit: That it fails to allege that before the commencement of said action the defendants or any of them entered into and dispossessed said plaintiff of the premises in said complaint described and unlawfully withholds from the plaintiff the possession thereof or any part thereof, as by law is required.

Wherefore defendants pray the judgment of the court whether they shall be required to answer said complaint further, and that they be hence dismissed with their costs.

T. W. JOHNSTON,
Attorney for Defendants.

II.

And, further answering *siad* complaint, by way of plea in bar to said action, defendants allege that one M. E. Collins, the common grantor and source of title of said Hamilton and Poland mining claims, in said complaint described, of both plaintiff and defendants, on the 25th day of October, 1883, signed, acknowledged, and delivered to one John M. Roberts a certain mortgage, which was duly recorded on the 25th day of October, 1883, in the office of the recorder of Yavapai county, Arizona Territory, in Book 3 of Mortgages, at pages 14, 15, 16, and 17 (which said record is prayed to be read as a part hereof as if fully herein set forth), whereby said Collins conveyed to said Roberts all of his interest in said mining claims in said complaint described to secure the payment of a certain promissors note in said mortgage set forth, due 12 months after the date thereof; that after the execution and delivery of

said mortgage, as aforesaid, the said Collins attempted to convey respectively to plaintiff and one Robert Schofield each a ¼ undivided interest in and to said mining claims; and thereafter, to wit, on the 21st day of August, 1886, the said
7 Collins having failed and refused to pay said note to said Roberts, the same having become due and payable, the said Roberts filed his complaint in this court in case numbered 1387, entitled "John M. Roberts *vs.* M. E. Collins, R. Schofield, and B. F. Thompson," the plaintiff herein, wherein he alleged the execution and delivery to him of said note and said mortgage, the maturity and failure to pay the said note, and the further fact that said Schofield and B. F. Thompson, plaintiff herein, claim some interest in the said Hamilton and Poland mining claims, which was subject to the lien of said mortgage on said mining claims, and prayed the judgment of the court that all of the interest of said Collins in said property in said mortgage described be foreclosed and sold, as provided by law, to pay said note, and that the alleged interest of said Schofield and B. F. Thompson, plaintiff herein, in said property be adjuged to be subject to the lien of said mortgage, and that they be thereafter forever barred from claiming the same by a decree in said case to be entered; and thereafter personal service was had in said case upon said Schofield, and service by publication and service of copy of summons and complaint was had upon said Collins and said Thompson, plaintiff herein, as required by law; and thereafter, at the trial of said case, on the 15th day of December, 1886, at the regular November term, 1886, of said court, said court did find that all of the defendants therein, to wit, said Collins, Schofield, and B. F.
Thompson, plaintiff herein, "were regularly served with
8 summons and copy of complaint," and that each of them failed to appear in said action within the time allowed by law, but made default, and that the default of each of said defendants was regularly entered therein, and that, a jury being waived upon the pleadings and proof introduced by the plaintiff, said court did further find that said Collins executed and delivered said note and mortgage in said complaint described upon the property therein mentioned, to wit, the said Hamilton and Poland mining claims, and that said note was then long since past due, and defendant was indebted to plaintiff therein in the sum of thirty-one hundred seventy-seven and $\frac{19}{100}$ dollars ($3,177.19), and that said defendants, Robert Schofield and B. F. Thompson, plaintiff herein, and each of them had some interest in said mortgaged property, to wit, the said Hamilton and Poland mining claims, and that the interest of the said Schofield and B. F. Thompson, plaintiff herein, and each of them was acquired subsequent to the execution of said mortgage and was subject to the lien thereof, and that on the 31st of August, 1886, the plaintiff therein filed with the recorder of Yavapai county, the county in which the mortgaged property is situated, notice of the pendency of said action and a description of the property affected thereby, which notice was duly recorded in the office of said county recorder on the 31st day of August, 1886, and that all the material allegations in said plaintiff's complaint therein were true, from

which said findings of fact said court at said time, as a conclusion of law, did find that the said plaintiff was entitled to judg-
9 ment and decree according to the prayer of his complaint in said action.

And thereafter, to wit, on the said 15th day of December, 1886, a decree and judgment in said case was duly made and given in accordance with said findings of fact and conclusions of law aforesaid, wherein it is adjudged that said defendants, Collins, Schofield, and Thompson, plaintiff herein, had each been regularly served with summons and had failed to appear within the time allowed by law, but made default, and that the default of each of them had been regularly entered, and that a jury therein had been waived and the case submitted to the court; that the court had made its findings of fact and conclusions of law, directing that a judgment and decree be entered therein in favor of the plaintiff and against the defendants in accordance with the prayer of plaintiff's complaint, and that the plaintiff had given due notice of the pendency of the action, and that the allegations in plaintiff's complaint were true, and that plaintiff Roberts do have and recover from defendant Collins three thousand one hundred seventy-seven and $\frac{19}{100}$ dollars ($3,177.19), with interest and costs, and that all and singular the mortgaged premises mentioned in plaintiff's complaint, to wit, being those particular mining lands, mining grounds, and mining claims situate in the Big Bug mining district, in the county of Yavapai, Territory of Arizona, and being described as follows, to wit, that certain mining claim known and called the "Hamilton," adjoining the
10 "Bell Extension" mine, in said Big Bug mining district, on the south, and which was located by C. E. Hitchcock, which said mining claim is 1,500 feet in length and 600 feet in width, and that certain other mining claim known and called the "Poland," which said Poland claim adjoins the aforesaid Hamilton claim on the south, and was located by D. R. Poland, the same being 1,500 feet in length by 600 feet in width, be sold as provided by law, or so much thereof as might be sufficient to raise the amount due to said plaintiff for principal, interest, and costs in said suit, and that said defendants, M. E. Collins, Robert Schofield, and B. F. Thompson, plaintiff herein, and each of them, and all persons claiming or to claim from or under them or either of them, and all persons having liens subsequent to said mortgage, and all persons having any lien or claim by or under such subsequent judgment or decree and their heirs or personal representatives, and all persons claiming under them, and all persons claiming to have acquired any estate or interest in said premises subsequent to the filing of said notice of the pendency of this action with the recorder, as aforesaid, be forever barred and foreclosed of and from all equity of redemption and claim in and to said mortgaged premises from and after the delivery of the said sheriff's deed, and that the purchaser of said mortgaged premises at such sale be let into the possession of such, and that any of the parties to said action that may by in possession of said premises or any part thereof and any person since the
11 commencement of said action who has come into the possession under them or either of them deliver possession thereof

to such purchaser on the production of said sheriff's deed for such premises or any part thereof.

All of which will more fully appear by referring to the records and files of this court in said case, each and all of which records are prayed to be read as a part of this complaint as if fully herein set forth.

And thereafter, pursuant to said decree and in obedience thereto, the said sheriff of said county, as required by law, did sell on the 17th day of March, 1887, said Hamilton and Poland mining claims, at which sale said John M. Roberts, plaintiff therein, became and was the purchaser and received the said sheriff's certificate of sale thereto, which was filed in the office of the county recorder of said county on the 17th day of March, 1887, and recorded in Book 23 of Deeds, pages 95 to 97, which is prayed to be read as a part of this answer.

And thereafter, on the 30th day of September, 1887, the said sheriff did make, execute, and deliver to said plaintiff, J. M. Roberts, the purchaser of said Hamilton and Poland mining claims, as aforesaid, pursuant to said decree and said certificate of sale, a deed by him duly signed and acknowledged, wherein he conveyed to said John M. Roberts all of said Hamilton and Poland mining claims in plaintiff's complaint in said cause described, which deed is recorded in said county recorder's office in Book 23 of Deeds, pages 449–452, and prayed to be read as a part hereof.

12 And thereafter, on the 20th of July, 1891, the said John M. Roberts, deceased, by his administrator, J. R. Lowry, pursuant to an order duly made on the 7th of July, 1891, by the probate court of said county and Territory, did sell and convey, by proper deed duly signed and acknowledged, to one E. M. Dickey said Hamilton and Poland mining claims, which deed is recorded in Book 30 of Deeds, page, 197, in said county recorder's office, and thereafter and before the institution of this suit the said E. M. Dickey, by proper deed of conveyance, conveyed said Hamilton and Poland mining claims, as will hereinafter be more particularly set forth, to these defendants, who are now the absolute and exclusive owners and in & entitled to the absolute and exclusive possession thereof.

Wherefore defendants say that if said plaintiff, Thompson, ever had any interest in said Hamilton and Poland mining claims described in his complaint the same was by said judgment and decree in said case made and given sold and disposed of and became the property of another, and plaintiff & Schofield were then & there ousted & dispossessed of said mining claims by said Roberts and subsequently and before the institution of this suit became the property of these defendants, and he was by said decree in said case duly made and given, as aforesaid, forever barred from setting up or asserting any claim thereto.

Wherefore defendants pray that plaintiff take nothing by his said complaint, and that defendants go hence with their costs.

T. W. JOHNSTON,
Att'y for Def'ts.

13 III.

And, further answering said complaint, defendants allege that the relation of cotenant or tenant in common established between plaintiff & M. E. Collins, said common grantor and common source of title to both plaintiff and defendants by said conveyance of an undivided ¼ interest in and to said Hamilton and Poland mining claims by said M. E. Collins to said plaintiff by deed dated August 18, 1884, was terminated, annulled, and ceased by virtue of the decree and judgment made and given in said case of Roberts against said Thompson *et al.*, set forth in detail in the preceding separate defense of this answer, and that on the 20th day of July, 1891, by virtue of the sale from said J. R. Lowry, administrator, and a deed of said property then and there executed, as aforesaid, to said E. M. Dickey, the said E. M. Dickey then and there became and was the exclusive owner of said Hamilton and Poland mining claims, and then and there, with hostile intent, entered into the exclusive and adverse possession of both of said mining claims; and thereafter, pursuant to section 2325 of the Revised Statutes of the United States and the mining laws of the United States of America, on the 16th day of December, 1891, commenced proceedings & thereafter applied to the register and receiver of the United States land office at Prescott, Arizona, for a patent to said Hamilton and Poland mining claims, and, having in all things complied with the
14 statutes in such cases made and provided by the Land Department of said United States of America, was adjudged to be the absolute and exclusive owner of all of said Hamilton and Poland mining claims, and pursuant to said judgment was on June 20th, 1893, & May 1st, 1893, granted a patent from the United States of America conveying to him the absolute title to all of said Hamilton and Poland mining claims respectively, which said patents are recorded respectively in Book 39 of Deeds, pages 623 & 626, in said county recorder's office and are prayed to be read as a part hereof, of which entrance into adverse possession on the 20th day of July, 1891, by said E. M. Dickey of all of said Hamilton and Poland mining claims with hostile intent, and of which said application of patent therefor by said E. M. Dickey and all of the proceedings had thereunder, which are prayed to be read as a part hereof, the said plaintiff had full and complete notice; and thereafter, as will hereinafter be more fully set forth, by proper deed of conveyance, duly executed, acknowledged, and recorded, the said E. M. Dickey and his grantees sold and conveyed the title to all of said mining claims to these defendants, who are now and were on October 6th, 1896, the sole and exclusive owners thereof and entitled to the sole and exclusive possession thereof.

Wherefore defendants allege that if said plaintiff ever had any interest in or title to either of said mining claims same was cancelled and annulled by the said proceedings had in the said land office by
15 said E. M. Dickey in procuring said patent to said mining claims, which said proceedings are herein referred to and prayed to be read as a part hereof as if fully herein set forth.

Wherefore defendants pray that plaintiff take nothing by his said complaint, and that they be hence dismissed with their costs.

T. W. JOHNSTON,
Att'y for Def'ts.

IV.

And, further answering plaintiff's complaint, defendants allege that the said E. M. Dickey, plaintiff's grantor, by virtue of a deed to all of said Hamilton and Poland mining claims to him delivered by J. R. Lowry, administrator of the estate of said J. M. Roberts, deceased, duly signed, acknowledged, and recorded in Book 30 of Deeds, page 197, in said county recorder's office, for which the said E. M. Dickey then and there paid a valuable consideration, to wit, the sum of $5,000.00, on July 20, 1891, was seized and possessed of all of said Hamilton and Poland mining claims, into the absolute and exclusive possession of which, hostile to all the world, said E. M. Dickey, on the 20th of July, 1891, did then and there enter; that thereafter, on December 14, 1891, the said E. M. Dickey caused to be relocated the said Poland mining claim, notice of which is recorded in Book 33 of Mines, pages 17 and 18, of said county recorder's office, and thereafter, on the 13th of July, 1892, said E. M. Dickey made an amended location thereof, which is recorded in Book 34 of Mines, page- 472, 473, in said county recorder's office; that
16 thereafter, for a valuable consideration to him paid by F. M. Murphy, the said E. M. Dickey, by deed duly signed and acknowledged on the 10th day of March, 1892, recorded in Book 31 of Deeds, pages 82 to 85, of said county recorder's office, did convey to said F. M. Murphy an undivided one-half interest in and to said Hamilton and Poland mining claims, and the said F. M. Murphy then and there, to wit, on March 10, 1892, was seized and possessed of said interest, and he then and there entered into the possession thereof.

That thereafter, for a valuable consideration then and there paid by C. D. Arms, said E. M. Dickey, by deed duly signed and acknowledged, did, on March 2, 1894, sell and convey to said C. D. Arms an undivided one-half interest in and to said Hamilton and Poland mining claims, which he then and there entered into possession of; which deed is recorded in Book 36 of Deeds, pages 3 to 6, in said county recorder's office.

And thereafter, for a valuable consideration then and there paid to him by these defendants, the said F. M. Murphy, by deed duly signed and acknowledged on the 7th day of July, 1894, did sell and convey to these defendants an undivided ½ interest in and to said Hamilton and Poland mining claims, which they then and there entered into possession of; which said deed is recorded in Book 36 of Deeds, pages 341 to 346, in said county recorder's office.

And thereafter the said C. D. Arms, for a valuable consideration to him then and there paid, by deed duly signed and acknowl-
17 edged, on May 4, 1895, did sell and convey to E. B. Gage an undivided one-half interest in and to said Hamilton and Poland mining claims, which he then and there entered into posses-

sion of, which said deed is recorded in Book 35 of Deeds, pages 574 and 575, in said county recorder's office, and thereafter, for a valuable consideration paid to him, the said E. B. Gage, by deed duly signed and acknowledged, on May 13th, 1895, did sell and convey to these defendants an undivided ½ interest in and to said Hamilton and Poland mining claims, which they then and there entered into possession of; which said deed is recorded in Book 35 of Deeds, pages 590 and 591, in said county recorder's office.

That on December 16, 1891, said E. M. Dickey instituted proceedings in the Land Department of the United States, as required by law, to obtain patents from the United States of America to all of said Hamilton and Poland mining claims, and said patents thereto *was* by said United States of America, pursuant to the application and proper proof made by said E. M. Dickey, issued to him under dates of June 20, 1893, and May 1st, 1893, respectively, conveying to said E. M. Dickey all of said Hamilton and Poland mining claims; which said patents are recorded in Book 39 of Deeds, pages 623 and 626 respectively, in said county recorder's office.

All and each of which said deeds above mentioned, said notice of location, and said proceedings for the obtaining of patents and
18 said patents are herein each referred to and prayed to be read as a part of this answer as if herein specifically set forth.

And defendants further allege that at the date of each of said respective conveyances the respective grantors therein were seized and possessed and in the exclusive possession of the aforesaid interests which each of them then claimed to own in the said Hamilton and Poland mining claims, and that at the dates of the acknowledgements of each of said respective deeds the grantees therein paid to said grantors a valuable consideration for the interests so purchased by them and entered into the possession thereof, and then and there had no notice, actual or constructive, from the record or *in pais*, of any claim whatsoever, legal or equitable, of the said plaintiff in and to any part of either of said Hamilton or Poland mining claims.

Defendants further allege that at the time of their said purchases of said property they paid a valuable consideration therefor, as above alleged; that their grantors were then and there seized in fee and were in the absolute and exclusive possession of all of said Hamilton and Poland mining claims, as were the grantors of defendants' grantors, as far back as and inclusive of said E. M. Dickey, and that said defendants, either before purchase by them or at the time thereof, had no notice, actual or constructive, from the records or *in pais*, of any claim, legal or equitable, of said plaintiff in and to any part of either said Hamilton or Poland mining claims.

19 Wherefore these defendants allege that they are *bona fide* actual and innocent purchasers of all of said Hamilton and Poland mining claims, for a valuable consideration paid therefor, without any notice, actual or constructive, either before or at the time of their said purchase, of any claim, legal or equitable, thereto by said plaintiff or any other person, and pray the judgment of the

court that said plaintiff take nothing by his said complaint, and that they be hence dismissed with their costs.

T. W. JOHNSTON,
Attorney for Defendants.

V.

And defendants, further answering plaintiff's complaint, in order to save repetition, adopt and make a part of this defense all of the allegations of the preceding defense in so far as they deraign their title to said Hamilton and Poland mining claims from and to said grantor, E. M. Dickey, to wit, July 20, 1891, and allege:

That plaintiff ought not — recover in or maintain this action for the reason that any right which he may have had for a cause of action affecting the title to said Hamilton and Poland mining claims is barred by the statute of limitations, this suit having been instituted on the 6th day of October, 1896, and any right of action which he may have had having accrued to him more than five years prior thereto, in this, to wit, that the grantors of these defendants
20 and of their grantors, to wit, E. M. Dickey, on the 20th day of July, 1891, by virtue of said deed of conveyance of J. M. Lowry, administrator of said J. M. Roberts, acknowledged and delivered on said date, was seized in fee and entered into the absolute and exclusive possession of and then and there owned all of said Hamilton and Poland mining claims; that the said grantor of said E. M. Dickey, to wit, J. M. Roberts, was seized in fee and entered into the absolute and exclusive possession of all of said Hamilton and Poland mining claims by virtue of a deed from the sheriff of said county to him, made and acknowledged on the 30th day of September, 1887, recorded in Book 23 of Deeds, pages 449 and 452, in said county recorder's office, and continued in the open, notorious, adverse, and hostile possession of said mining claims from said date until July 20, 1891, the date of his said sale to E. M. Dickey, of which facts the said plaintiff had actual and constructive notice.

That said possession and ownership of said E. M. Dickey therein was open, notorious, exclusive, adverse, and hostile to all the world; that said plaintiff then and there, to wit, on the 20th day of July, 1891, had actual and constructive notice of the possession and claim of ownership of said E. M. Dickey, and that said E. M. Dickey paid taxes upon both of said mining claims, did all assessment-work annually required upon either, expended large sums of money in the development and operation of both, made improvements thereon, applied for a patent to all thereof, and patented the same, and,
21 as it suited his convenience, sold and disposed of various interests in the same, and in all things acted as though he was, and, as a matter of fact, claimed to be and was, the absolute and exclusive owner of both of said mining claims from and after said date of July 20, 1891, as above alleged, of which plaintiff had long before been entirely disseized and dispossessed, of all of which said action on the part of said E. M. Dickey said defendant then and there had actual and constructive notice, and not until October 6, 1896, the date of the institution of this proceeding, did plaintiff pretend or

claim to have any interest whatsoever in and to either of said mining claims.

Wherefore these defendants say that whatever claim or right of action plaintiff may have had theretofore the same, on the date of the institution of this proceeding, was not brought within the limits of the five years during which he had a right to institute the same, and this right of action, if any he ever had, is barred by the statute of limitations, which defendants hereto now plead in their defense to this action.

Wherefore defendants pray the judgment of the court that plaintiff take nothing by his said complaint, and that they be hence dismissed with their costs.

T. W. JOHNSTON,
Attorney for Defendants.

VI.

22 Further answering said complaint, defendants admit the allegations of paragraph 1 of plaintiff's complaint and deny that long before October 6, 1896, the date of the institution of this suit, that plaintiff was the owner of an undivided one-half interest in and to either said Hamilton or Poland mining claims, as in said complaint alleged and set forth, and deny that said plaintiff has now any right to or interest in any part of either of said mining claims, as in said complaint alleged; admit the description of said Hamilton and Poland mining claims as set forth in said complaint, and allege that these defendants are now and were at the date of the institution of this suit and long prior thereto the absolute and exclusive owners of both of said Hamilton and Poland mining claims and entitled to the absolute and exclusive possession of both of said mining claims, and deny that plaintiff has any interest or estate in and to either of said mining claims or any part of either, and allege that said defendants claim that their interest in and to said Hamilton and Poland mining claims is adverse and hostile to and exclusive of not only plaintiff, but of all the world.

Wherefore these defendants pray the judgment of the court:

I.

That they be adjudged and decreed to be the absolute and exclusive owners of both said Hamilton and Poland mining claims in said complaint described, and entitled to the absolute and exclusive possession of each and both of them.

23 II.

That plaintiff be enjoined from asserting any claim to any interest in either said Hamilton or Poland mining claims, and

III.

For all other and further relief which to the court may seem meet and proper in the premises, and for costs of suit.

T. W. JOHNSTON,
Attorney for Defendants.

And, further answering plaintiff's complaint herein, the said defendants plead "not guilty," and pray the judgment of the court that said plaintiff take nothing by his said complaint, and that they be hence dismissed with their costs.

T. W. JOHNSTON,
Attorney for Defendants.

TERRITORY OF ARIZONA, }
County of Yavapai. }

Before the undersigned authority personally appeared T. W. Johnston, who, after being first duly sworn, deposes and says that he is the attorney for said defendants in above case; that he has read the foregoing answer and knows the same to be true, except as to matters and things therein stated on information and belief, and as to such matters he believes them to be true.

T. W. JOHNSTON,
Att'y for Def'ts.

Subscribed and sworn to before me on this the 7th day of May, 1897.

[SEAL.] J. E. MORRISON,
Notary Public.

My commission expires Jan'y 17, '98.

24 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

B. F. THOMPSON, Plaintiff, *vs.* D. M. FERRY, SIMON J. MURPHY, and C. C. BOWEN.	Plaintiff's Answer. Service Acknowledged this 19th Day of May, 1897. T. W. Johnston, Attorney for Defendants. Filed June 1st, 1897, at 10 o'clock a. m. A. J. Herndon, Clerk.

Answer of Plaintiff to Defendants' Cross-complaint in Paragraph VI of Answer.

Comes now the plaintiff, and answering the allegations contained in subdivision VI of defendants' answer, in which they pray for affirmative relief, says:

That on the 25th day of October, 1883, one M. E. Collins was the owner of an undivided one-half interest in and to the said Poland and Hamilton mining claims and no more; that on said day the said Collins made, executed, acknowledged, and delivered to one John M. Roberts a mortgage upon all of his interest in and to said mining claims, being at said date an undivided one-half interest.

That after the execution and delivery of said mortgage and the recording of the same in the county recorder's office, in said county, the said Collins purchased the other one-half interest in the
25 said Poland and Hamilton mining claims in the following manner—that is to say, that on the 14th day of November, 1883, one Charles C. Lane, being then and there the owner of an

undivided one-fourth interest in said Poland and Hamilton mining claims, conveyed his said interest by good and sufficient deed to the said M. E. Collins, which said deed was duly acknowledged, and thereafter, on the 7th day of January, 1884, said deed was duly recorded in Book 18 of Deeds, at page 451, in the office of the county recorder in said Yavapai county, to which said deed and the said record thereof reference is hereby made, and it is prayed that the same be considered a part hereof, the same as if fully set forth herein; that thereafter, on, to wit, the 18th day of August, 1884, the said M. E. Collins, by a good and sufficient deed sold and conveyed to B. F. Thompson, the plaintiff herein, an undivided one-fourth interest in and to said Poland and Hamilton mining claims, which said deed was on the 19th day of August, 1884, duly recorded in Book 19 of Deeds, page 401 *et seq.*, in said county recorder's office.

That from the said 18th day of August, 1884, down to and including the date of the filing of this complaint, the said plaintiff is now and has been the absolute owner of and entitled to the possession of the said undivided one-fourth interest in said Poland and Hamilton mining claims.

That subsequent to the making of said mortgage to said Roberts by said Collins one John Howell, who was the owner of an undivided one-fourth interest in and to the said properties, made
26 and executed his good and sufficient deed to said interest, selling and conveying the same to the said M. E. Collins, and on the 8th day of December, 1883, the said Howell then and there acknowledged said deed, and on said day delivered the same to said Collins, and which said deed was, on the 18th day of January, 1884, duly recorded in said recorder's office, in Book 19 of Deeds, page 263.

That thereafter, on, to wit, the 14th day of November, 1883, the said M. E. Collins, by his good and sufficient deed, made, executed, acknowledged, and delivered on said last-mentioned day, sold and conveyed to one Robert Schofield said last-mentioned undivided one-fourth interest in and to said Poland and Hamilton mining claims; which said deed was duly recorded in the office of the said county recorder on the 15th day of December, 1883, in Book 18 of Deeds, page 384.

That on the 23rd day of July, 1896, the said Robert Schofield made, executed, and delivered to the plaintiff herein his good and sufficient deed, selling and conveying to said plaintiff all his right, title, and interest in and to the said properties, which said interest was an undivided one-fourth interest therein; that said deed was duly acknowledged on the said 23rd day of July, 1896, and thereafter, on the — day of ——, 1897, said deed was duly recorded in the office of the said county recorder of Yavapai county, Arizona, in Book — of Deeds, page —.

27 Plaintiff makes reference to all of said deeds and conveyances and prays that the same and the records thereof be considered a part hereof the same as if fully set forth herein.

That by such purchases and conveyances the said plaintiff was at the time of the filing of the complaint herein the absolute owner

of an undivided one-half interest in and to the said Poland and Hamilton mining claims and entitled to the possession thereof, according to the records of said county recorder's office, open to the inspection of the said defendants, their predecessors, and the entire world, and with such record notice the said defendants were not purchasers without notice of the title of plaintiff and his predecessors in and to an undivided one-half interest in and to said properties and acquired subsequent to the execution and delivery of said mortgage from said Collins to said Roberts, under which said defendants claim title to all of said mining claims.

Wherefore said plaintiff prays the judgment of this court that he be decreed to be the absolute owner of an undivided one-half interest in and to the said Poland and Hamilton mining claims, and that the said defendants be forever enjoined and debarred from asserting or claiming any interest, right, or title in and to said mining property of plaintiff and for costs of suit.

MORRISON & MORRISON,
Attorneys for Plaintiff.

28 And as another and separate answer to defendants' cross-complaint as set forth in subdivision VI of defendants' answer herein the plaintiff herein says:

That said plaintiff denies that the said defendants are now and were for a long time prior to the date of the institution of this suit or at any time the absolute and exclusive owners of both of said Poland and Hamilton mining claims and entitled to the absolute and exclusive possession of both of said mining claims, but alleges the fact to be that the said defendants are the owners of but an undivided one-half interest in and to said mining claims, and that said plaintiff was for a long time prior to the date of the filing of the complaint herein, had been, and is now the owner of the other undivided one-half interest in and to said mining claims and entitled to the absolute and exclusive possession of an undivided one-half interest therein.

That, for the purpose of establishing plaintiff's claim to an undivided one-half interest in and to the said mining claims, plaintiff makes a part of this defense all of the allegation contained in the preceding defense set forth in this answer to defendants' cross-complaint, and fails to set the same forth herein solely to save repetition.

Plaintiff further alleges the fact to be that one M. E. Collins is the common grantor and source of title of both plaintiff and defendants in said mining claims; that from said common source of title defendants derive their title in the following manner:

29 That on or about the 25th day of October, 1883, the said M. E. Collins executed, properly acknowledged, and delivered to one John M. Roberts his certain mortgage, which was recorded on the 25th day of October, 1883, in Book 3 of Mortgages, at page 14, in the office of the county recorder of Yavapai county, Arizona; that according to the terms of said mortgage the said Collins conveyed to said Roberts all of his right, title, and interest in said prop-

erties to secure the payment of a certain promissory note, fully set forth in said mortgage, reference to which said mortgage and the record thereof is hereby made, and it is prayed that the same be considered a part hereof the same as if fully set forth herein, and plaintiff alleges the fact to be that all of the right, title, and interest of said Collins in and to said Poland and Hamilton mining claims at the date of said mortgage was an undivided one-half interest; that thereafter and subsequent to the maturity of said promissory note the mortgagee named in said mortgage, John M. Roberts, instituted legal proceedings in the district court in and for said county of Yavapai against said M. E. Collins, mortgageor, praying for the foreclosure of said mortgage and the sale of the property described therein to satisfy the promissory note by it secured, together with interest and costs; that thereafter legal service of summons was had upon the said M. E. Collins, and that on one of the days of the regular November, 1886, term of said court, to wit, on the 15th day of December, 1886, a decree and judgment was duly made and
30 entered of record decreeing the foreclosure of said mortgage, and that judgment therein be rendered in favor of the plaintiff Roberts and against defendant Collins, together with Robert Schofield and B. F. Thompson, in accordance with the prayer of plaintiff's complaint "that all and singular the mortgaged premises mentioned in plaintiff's complaint" and as the said judgment directs "and hereinafter described, or so much thereof as may be sufficient to raise the amount due to the plaintiff, after paying interest and costs in this suit, expenses of sale, be sold at public auction by and under the direction of the sheriff of the county of Yavapai, A. T., where said mortgaged premises are situated," and according to the terms of said judgment and decree the description and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to and from the complaint filed in this action, are as follows, to wit, being *that* particular mining lands, mining grounds, and mining claims situate in the Big Bug mining district, in the county of Yavapai, in the Territory of Arizona, and being described as follows, to wit, that certain mining claim known and called the "Hamilton," adjoining the Bell Extension mine, in said Big Bug mining district, on the south, and was located by C. E. Hitchcock, which said mining claim is fifteen hundred feet in length by six hundred feet in width, and that certain other
31 mining claim known and called the "Poland," which said Poland claim adjoins the aforesaid Hamilton claim on the south, and was located by D R. Poland, the same being fifteen hundred feet in length by six hundred feet in width.

That said plaintiff alleges that, according to the true title of said mining claims down to the date of the foreclosure of said mortgage and the entering of said judgment of record and according to said judgment itself, the said Roberts was only entitled to satisfy his said judgment out of all the right, title, and interest of the said Collins in and to said Poland and Hamilton mining claims, and that as to said undivided one-half interest the said Schofield and Thompson

had no defence whatever to make in said action, to which they were made parties, not having any right, title, or interest in and to the "mortgaged premises" described in the complaint in said cause.

That thereafter and according to the judgment in said case the sheriff of said county, on the 17th day of March, 1887, did sell the said mortgaged premises at public auction, at which said sale the said John M. Roberts became the purchaser and received certificate of sale from the sheriff, which said certificate was duly recorded in the office of the county recorder of Yavapai county, in Book 23 of Deeds, page 95 *et seq.*, and that on the 30th day of September, 1887, the time for redemption having expired, the said sheriff did make and deliver to the said purchaser and plaintiff in said action
32 a deed, wherein he attempted to convey to said John M. Roberts, purchaser, as aforesaid, all of said Hamilton and Poland mining claims, which said deed is recorded in Book 23 of Deeds, at page 449, in the office of the said county recorder.

That thereafter, to wit, on the 20th day of July, 1891, J. R. Lowry, as the administrator *to* the estate of John M. Roberts, deceased, in accordance with the order of the probate court of the said county, sold and conveyed by deed to one E. M. Dickey said Hamilton and Poland mining claims, and that said E. M. Dickey, illegally and wrongfully claiming to be the owner of all of the Poland and Hamilton mining claims, when in truth and in fact he was the owner of only an undivided one-half interest in and to said mining claims, filed his application for a patent to said mining claims in the United States land office at Prescott, Arizona, in accordance with the United States statutes in such cases made and provided, and was subsequently granted patents from the United States of America conveying to him the title to all of the Poland and Hamilton mining claims, which said patents were thereafter duly recorded in the office of the county recorder of said Yavapai county, and it is prayed that said patents be read as a part hereof; that by various conveyances, all of which are of record in the office of the county recorder of Yavapai county, Arizona, and which said conveyances are hereby referred to and prayed to be read as a part hereof, the said defendants had conveyed to them the property described in the said
33 United States patents.

That from the allegations set forth in this defence it appears, and plaintiff therefore states the fact to be, that at the time of the filing of the complaint herein the said defendants were and ever since have been the co-owners and tenants in common with the said plaintiff in and to all of the said Poland and Hamilton mining claims, and that said defendants, claiming under the United States patents from the United States Government in and to said mining properties, are the trustees of plaintiff's one-half undivided interest in and to the said Poland and Hamilton mining claims.

Wherefore plaintiff prays that by a decree of this court he be declared to be the absolute owner of an undivided one-half interest in and to the said Poland and Hamilton mining claims and entitled to the undisputed possession of said interest.

That the said defendants, by such decree, be declared to be the

trustees for plaintiff of plaintiff's one-half undivided interest in and to said Poland and Hamilton mining claims.

That the said defendants be required by the decree of this court, by a good and sufficient deed, to convey to this plaintiff his said one-half undivided interest in and to said property.

That said defendants be forever enjoined from in any way claiming or asserting any right, title, or interest in and to the said undivided one-half interest of this plaintiff in said mining claims.

That plaintiff do have and recover of and from the said defendants his costs herein sustained.

MORRISON & MORRISON.
Attorneys for Plaintiff.

In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

B. F. THOMPSON, Plaintiff, *vs.* D. M. FERRY, SIMON J. MURPHY, and Charles C. Bowen, Defendants.	Amended Complaint. Service by Copy Acknowledged this 18th Day of August, 1897. T. W. Johnston, Attorney for Defendants. Filed August 18th, at 2.30 o'clock p. m., 1897. J. M. Watts, Clerk.

Amended Complaint.

Comes now the above-named plaintiff, B. F. Thompson, and files this his amended complaint, and for first cause of action alleges:

I.

That the plaintiff is a resident of the county of Clark, in the State of Wisconsin, and that the defendants are residents of the city of Detroit, in the State of Michigan.

II.

That the said plaintiff is and for a long time heretofore has been the owner of an undivided one-half interest in and to that certain mining claim situate, lying, and being in the Big Bug mining district, Yavapai county, Arizona, known and described as follows, to wit:

The Poland mining claim, located on the second day of August, 1875, by D. R. Poland, notice of which said location is of record in Book C 3 of Mines, at pages 309 and 310, in the office of the county recorder of Yavapai county, Arizona, to which said notice of
35 location and the record thereof reference is hereby made for more particularity of description of said mining claim.

That the said plaintiff claims title, as aforesaid, in said premises.

That the said defendants claim an estate or interest therein adverse to this plaintiff.

That the claim of said defendant is without any right whatsoever, and said defendants have no right, title, or interest whatever in

plaintiff's interest in said mining claim or premises or any part thereof.

2.

And for a second, separate, and other cause of action said plaintiff alleges:

I.

That the plaintiff is a resident of the county of Clark, in the State of Wisconsin, and that the defendants are residents of the State of Michigan and the city of Detroit.

II.

That the said plaintiff is and for a long time heretofore has been the owner of an undivided one-half interest in and to that certain mining claim situate, lying, and being in the Big Bug mining district, Yavapai county, Arizona Territory, known and described as follows, to wit:

The Hamilton mining claim, located on the 28th day of September, 1875, by Wm. Gavin, notice of which said location is of record in Book C 3 of Mines, page 416, in the office of the county
36 recorder of Yavapai county, Arizona, to which said location notice and the record thereof reference is hereby made for more particularity of description, and the same is made a part hereof.

That the plaintiff claims title, as aforesaid, in said mining claim and premises.

That the said defendants claim an estate or interest therein adverse to this plaintiff.

That the said claim of defendants is without any right whatsoever, and said defendants have no right, title, or interest whatever in plaintiff's interest in said mining claim or premises or any part thereof.

3.

And for a third, separate, and other cause of action plaintiff alleges:

I.

That the plaintiff is a resident of the county of Clark, in the State of Wisconsin, and that the defendants are residents of the city of Detroit, in the State of Michigan.

II.

That said plaintiff is and for a long time heretofore has been the owner of an undivided one-half interest in and to those certain mining claims situate, lying, and being in the Big Bug mining district, Yavapai county, Arizona Territory, known and described as follows, to wit:

The Poland mining claim, located on the 2nd day of August, 1875, by D. R. Poland, notice of which said location is of
37 record in Book C 3 of Mines, at pages 309 and 310, in the office of the county recorder of Yavapai county, Arizona Territory; also—

The Hamilton mining claim, located on the 28th day of September, 1875, by Wm. Gavin, notice of which location is of record in Book C 3 of Mines, page 416, of said county records; to which said location notices and the records thereof reference is hereby had and made for more particularity of description, and the same is made a part hereof.

Plaintiff further alleges the fact to be that one M. E. Collins is the common grantor and source of title of both plaintiff and defendants in and to said mining claims; that on or about the 25th day of October, 1883, the said M. E. Collins was the owner of an undivided one-half interest in and to the said mining claims; that on or about the said last-mentioned day the said M. E. Collins executed, properly acknowledged, and delivered to one John M. Roberts his certain mortgage, which was recorded on the 25th day of Oct*ob*er, 1883, in Book 3 of Mortgages, at page 14, of said county records; that, according to the terms of said mortgage, the said Collins conveyed to said Roberts all of his right, title, and interest in and to said properties (the same being then and there an undivided one-half interest thereto) to secure the payment of a certain promissory note, fully set forth in said mortgage, reference to which said mortgage and the record thereof is hereby made, and it is prayed that the same be considered a part hereof the same as if fully set forth herein.

38 That after the execution and delivery of said mortgage and the recording of the same, as aforesaid, said M. E. Collins purchased the other undivided one-half interest in the said Poland and Hamilton mining claims in the following manner—that is to say: That on the 14th day of November, 1883, one Chas. C. Lane, being then and there the owner of an undivided one-fo-rth interest in said Poland and Hamilton mining claims, conveyed his said interest by good and sufficient deed to the said M. E. Collins, which said deed was duly acknowledged, and thereafter, on the 7th day of January, 1884, said deed was duly recorded in Book 18 of Deeds, at page 451, in the office of the county recorder of said Yavapai county; to which said deed and the record thereof reference is hereby made, and it is prayed that the same be considered a part hereof the same as if fully set forth herein; that subsequent to the making of said mortgage to said Roberts by said Collins, on, to wit, the 16th day of November, 1883, one John Howell, who was then and there the owner of an undivided one-fourth interest in and to said property, made and executed his good and sufficient deed to said interest in said property, selling and conveying the same to the said M. E. Collins, and on the 8th day of December, 1883, the said Howell then and there duly acknowledged said deed and delivered the same to said Collins, and which said deed was, on the 18th day of January, 1884, duly recorded in said recorder's office, in Book 19 of Deeds, page 263; that thereafter, to wit,

39 on the 18th day of August, 1884, the said M. E. Collins, by a good and sufficient deed, sold and conveyed to B. F. Thompson, the plaintiff herein, an undivided one-fourth interest in and to said Poland and Hamilton mining claims, which

said deed was on the 19th day of August, 1884, duly recorded in Book 19 of Deeds, page 401, of said county records; that on the fourteenth day of November, 1885, the said M. E. Collins, by his good and sufficient deed, made, executed, acknowledged, and delivered on said last-mentioned day, sold and conveyed to one Robert Schofield an undivided one-fourth interest in and to said Poland and Hamilton mining claims, which said deed was duly acknowledged, and on the fifteenth day of December, 1883, was duly recorded in Book 18 of Deeds, page 384, of said county records; that on the 23rd day of July, 1896, the said Robert Schofield made, executed, and delivered to the plaintiff herein his good and sufficient deed, selling and conveying to said plaintiff all his right, title, and interest in and to the said Poland and Hamilton mining claims, which said interest was an undivided one-fourth interest therein; that said deed was duly acknowledged on the said 23rd day of July, 1896, and thereafter, on the 19th day of May, 1897, said deed was duly recorded in Book 42 of Deeds, page 118, of said county records.

That thereafter and subsequent to the maturity of the said promissory note above referred to the mortgagee named in said mortgage above mentioned, John M. Roberts, instituted legal proceedings in the district court of said Yavapai county against said M. E. Collins, said Robert Schofield, and the said B. F. Thompson, plaintiff
40 herein, praying for the foreclosure of said mortgage and the sale of the property described in said mortgage to satisfy the promissory note by it secured; that thereafter legal service of summons was had upon said M. E. Collins, and on one of the days of the regular November, 1886, term of said court, to wit, on the 15th day of December, 1886, a decree and judgment was duly made and entered of record, decreeing the foreclosure of said mortgage, and that judgment therein be rendered in favor of the plaintiff Roberts and against the said defendants therein, Collins, Schofield, and Thompson, in accordance with the prayer of plaintiff's complaint, to wit: "That all and singular the mortgaged premises mentioned in plaintiff's complaint" and as said judgment directs "and hereinafter described, or so much thereof as may be sufficient to raise the amount due to the plaintiff Roberts, after paying interest and costs in this suit, expenses of sale, be sold at public auction by and under the direction of the sheriff of the county of Yavapai, A. T., where said mortgaged premises are situated," and, according to the terms of said mortgage and decree, "the description and particular boundaries of the property authorized to be sold and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to and from the complaint filed in this action, are as follows: Being *that* particular mining lands, mining grounds, and mining claims situate in the Big Bug mining district, in the county of Yavapai, in the Territory of Arizona, and being described as
41 follows, to wit: That certain mining claim known and called the Hamilton, adjoining the Belle Extension mine, in said Big Bug mining district, on the south, and was located by C. E. Hitchcock, which said mining claim is fifteen hundred feet in length by six hundred feet in width, and that certain other mining claim

known and called the Poland, which said Poland claim adjoins the aforesaid Hamilton claim on the south, and was located by D. R. Poland, the same being fifteen hundred feet in length by six hundred feet in width."

That thereafter and according to the judgment in said case the sheriff of said county, on the 17th day of March, 1887, did sell the said mortgaged premises at public auction, at which said sale the said John M. Roberts became the purchaser and received certificate of sale from the sheriff of said county, which said certificate was duly recorded in the office of the county recorder of Yavapai county, in Book 23 of Deeds, page 95, and that thereafter, on the 30th day of September, 1887, the time for redemption having expired and no redemption having been made, the said sheriff did make and deliver to the said purchaser and plaintiff in said action a deed wherein he attempted to convey to said John M. Roberts, purchaser as aforesaid, all of said Hamilton and Poland mining claims, which said deed is recorded in Book 23 of Deeds, page 449, of said county records.

That thereafter, to wit, on the 20th day of July, 1891, J. R.
42 Lowry, as the administrator of the estate of John M. Roberts, deceased, in accordance with the order of the probate court of said county, did sell and convey by good and sufficient deed to one E. M. Dickey all the right, interest, and estate of the said John M. Roberts, deceased, at the time of his death, and also all of the right, title, and interest that the said estate, by operation of law or otherwise, may have acquired other than or in addition to that of said intestate at the time of his death in and to the said Hamilton and Poland mining claims, which said deed is of record in Book 30 of Deeds, page 197, of said county records.

That thereafter the said E. M. Dickey filed his application for United States patent to all of said Hamilton mining claim; that said application was made in the proper land office on the 2nd day of August, 1892, and thereafter, on the 20th day of June, 1893, a patent to said Hamilton mining claim was issued by the United States of America to the said E. M. Dickey for all of the said Hamilton mining claim; that on the 3rd day of September, 1892, said E. M. Dickey made application in the proper land office for a patent from the United States Government to the said Poland mining claim, and that thereafter, on the 1st day of May, 1893, a patent to all of said Poland mining claim was issued to the said E. M. Dickey; that the said patent to the Hamilton mining claim is recorded in Book 39 of Deeds, page 623, of said county records, and that the patent to said Poland mining claim is recorded in Book 39 of Deeds,
43 page 626, of said county records; that on the 10th day of March, 1892, the said E. M. Dickey, by deed duly signed and acknowledged, conveyed to one F. M. Murphy an undivided one-half interest in and to the said Hamilton and Poland mining claims, which said deed is recorded in Book 31 of Deeds, page 82, of said county records, and that on the 2nd day of March, 1894, the said E. M. Dickey, by deed duly signed and acknowledged, did attempt to sell and convey to one C. D. Arms an undivided one-half interest

in and to the said Hamilton and Poland mining claims, which said deed is recorded in Book 36 of Deeds, page 3 *et seq.*, in said county recorder's office, and thereafter the said F. M. Murphy, on, to wit, the 7th day of July, 1894, by deed duly signed and acknowledged, did sell and convey to these defendants and undivided one-half interest in and to the said Hamilton and Poland mining claims, which said deed is recorded in Book 36 of Deeds, page 341 *et seq.*, of said county records; that on May 4, 1895, the said C. D. Arms, by deed signed and acknowledged, did attempt to sell and convey to E. B. Gage an undivided one-half interest in and to said Hamilton and Poland mining claims, which said deed is recorded in Book 35 of Deeds, page 574 *et seq.*, of said county records, and on the 18th day of May, 1895, the said E. B. Gage, by deed signed and acknowledged, did attempt to sell and convey to these defendants an undivided one-half interest in and to said Poland and Hamilton mining claims, which said deed is recorded in Book 35 of Deeds, at page 590 *et seq.*, of said county records, and said plaintiff prays
44 that all of the foregoing deeds and records thereof, together with the record and files in the case of Roberts *vs.* Collins, Thompson, and Schofield, in which said mortgage was foreclosed, as also the certificate of sale issued by said sheriff in accordance with the judgment in said last-mentioned case, and also the deed of said sheriff to said John M. Roberts, be considered a part of this complaint the same as if fully set forth herein, and the same are made a part hereof.

That the said plaintiff and said Schofield, at the time of the conveyance to them by the said M. E. Collins of their interest in said Poland and Hamilton mining claims, as hereinbefore set forth, paid a valuable consideration for said properties and entered into possession of said interests, and so remained in the peaceable and quiet possession of said interests in said properties until the 23rd day of July, 1896, at which said date the said Robert Schofield conveyed his interest in said Poland and Hamilton mining claims to the plaintiff herein, as hereinbefore fully set forth, and that from said last-mentioned date the plaintiff herein remained in the quiet and peaceable possession of an undivided one-half interest in and to said Poland and Hamilton mining claims down to and including the 21st day of September, 1896, when the said defendants for the first time denied the title of plaintiff or of said Schofield in and to said undivided one-half — in said Poland and Hamilton mining claims, and on said last-mentioned date said defendants did dispossess and oust said plaintiff from the possession of said undivided one-half
45 interest in and to the said Hamilton and Poland mining claims.

That from the allegations set forth in this complaint it appears, and plaintiff therefore states the fact to be, that at the time of the filing of the complaint herein the said defendants were, ever since have been, and are now the co-owners and tenants in common with the said plaintiff in and to all of the said Poland and Hamilton mining claims, and the said defendants, claiming under the said United States patent from the United States Government the title to

the said mining properties, are the trustees of plaintiff's one-half undivided interest in and to the said Poland and Hamilton mining claims.

Wherefore plaintiff prays that by decree of this court he be declared to be the absolute owner of an undivided one-half interest in and to the said Poland and Hamilton mining claims and entitled to the undisputed possession of said interest;

That the said defendants, by such decree, be declared to be the trustees for plaintiff of plaintiff's one-half undivided interest in and to said Poland and Hamilton mining claims;

That the said defendants be required by decree of this court, by a good and sufficient deed, to convey to this plaintiff his said one-half undivided interest in and to said property;

That said defendants be forever enjoined from in any way asserting any right, title, or interest in and to said undivided one-half interest of this plaintiff in and to said Poland and Hamilton
46 mining claims;

That plaintiff do have and recover of and from these defendants his costs herein sustained, and

That this plaintiff have such other, further, and different relief as to the court may seem just and proper.

MORRISON & MORRISON,
Attorneys for Plaintiff.

In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

B. F. THOMPSON, Plaintiff, *vs.* D. M. FERRY, SIMON J. MURPHY, and Charles C. Bowen, Defendants.	Decree. Entered Judgment Book No. 5, at page 646; Docket No. 2, page 110. Filed at 4 o'clock p. m., Dec. 21, 1897. J. M. Watts, Clerk.

On this the 21 day of December, 1897, the same being a regular day in the November term (1897) of said court, came on to be heard the above-entitled cause upon amended complaint and amended answer, and, a jury being expressly waived by the parties plaintiff and defendant, the same was tried before the court upon oral evidence of witnesses examined in open court, and the court, being fully advised in the premises, does find:

First. That defendants' grantor, E. M. Dickey, was never
47 at any time a cotenant or joint owner or co-owner with B. F. Thompson, the plaintiff, in either the Poland mining claim or the Hamilton mining claim, hereinafter more particularly described;

Second. That for more than five years preceding October 6th, 1896, the date at which plaintiff's original complaint was filed in this cause, defendants' said grantor, E. M. Dickey, was in the open, notorious, exclusive, peaceable, and adverse possession of both the said Poland mining claim and the Hamilton mining claim, asserting and claiming to be the absolute and exclusive owner thereof

and all parts thereof, hostile and adverse to said plaintiff and all the world, and was at said date the absolute and exclusive owner of all of both of said mining claims and entitled to the absolute and exclusive possession of both of the same and of all the parts thereof; and,

Third. That the said E. M. Dickey and his grantees, inclusive of said defendants, for more than five years, continuously and uninterruptedly, prior to the date of the institution of this suit, continued in the absolute, exclusive, and peaceable possession of both of said mining claims adverse and hostile to all the world, and particularly to plaintiff.

Wherefore, by virtue of the premises, as a matter of law, it is by the court ordered, adjudged, and decreed:

1st. That the plaintiff's said action against these defendants was, on the date of its institution, to wit, October 6th, 1896, barred
48 by the statutes of limitation of five years, as provided in par. 2299 of Revised Statutes of Arizona Territory, 1887, and that he therefore take nothing by his said complaint.

2nd. It is further ordered, adjudged, and decreed that said defendants, D. M. Ferry, Simon J. Murphy, and Charles C. Bowen, are the owners and entitled to the exclusive possession of the said Poland mining claim, located on the 2nd day of August, 1875, by R. Poland, the notice of which said location is of record in Book C 3 of Mines, at pages 309 and 310, in the office of the county recorder of Yavapai county, Arizona Territory, and of the Hamilton mining claim, located on the 28th day of September, 1875, by William Gavin, notice of which said location is of record in Book C 3 of Mines, page 416, in the office of the county recorder of Yavapai county, Arizona Territory, both of which said location notices and the record thereof are made a part of this decree and judgment for more particularity of description of said mining claims as if herein set forth in detail, being the said mining claims in plaintiff's said complaint described.

3rd. That plaintiff take nothing by his said complaint, and that the same be dismissed, and that defendants be hence dismissed, and that they do have and recover of plaintiff the costs by them in this behalf expended, to wit, $34.15, as per cost bill on file.

Ordered, adjudged, and decreed on this the 21st day of December, 1897.

RICHARD E. SLOAN, *Judge.*

49 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

B. F. THOMPSON, Plaintiff,
vs.
D. M. FERRY, SIMON J. MURPHY, and Charles C. Bowen, Defendant-.

No. 2618. Certificate to Judgment-roll. Judgment-roll. Filed Dec. 21st, 1897. Judgment Book 5, p. 646; Docket Book 2, p. 110. —— ——, Clerk.

Certificate to Judgment-roll.

TERRITORY OF ARIZONA, } ss:
County of Yavapai, }

I, J. W. Watts, clerk of the district court of the fourth judicial district of the Territory of Arizona in and for the county of Yavapai, do hereby certify the above and foregoing to be a full, true, and correct copy of the judgment entered in the above numbered and entitled cause as recorded in Judgment Book No. 5 of said court, at page 646 *et seq.*, and docketed in Judgment Docket No. 2, at folio 110, and I further certify that the foregoing papers hereto attached do constitute the judgment-roll in said action.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 21st day of Dec., A. D. 1897.

J. M. WATTS,
Clerk District Court.

[DISTRICT COURT SEAL.]

50 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

B. F. THOMPSON, Plaintiff,
vs.
D. M. FERRY ET AL., Defendant-.

No. 2618. Motion for a New Trial. Service Accepted this 21st Day December, 1897, and to be Filed as of December 21st, 1897. T. W. Johnston, Attorney for Defendants. Filed Dec. 21st, 1897. J. M. Watts, Clerk.

Motion for a New Trial.

Comes now the above-named plaintiff and moves the court to set aside the judgment rendered in this action on the 21st day of December, 1897, and grant a new trial for the following reasons, to wit:

First. That the findings of fact and law as filed by the court are contrary to the evidence and the law applicable to the case.

Second. That the judgment of the court is contrary to and not supported by the evidence.

Third. That the judgment herein is contrary to the law.

MORRISON & MORRISON,
Attorneys for Plaintiff.

51 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai, November Term, 1896.

NOVEMBER 24TH, 1896.

Hon. J. J. Hawkins, judge, presiding.

B. F. THOMPSON, Plaintiff,
vs.
D. M. FERRY, SIMON J. MURPHY, and CHARLES C. BOWEN, Defendants. } No. 2618.

Ordered that defendants have until December 15th, 1896, to answer, as per stipulation.

Court took a recess until 10 o'clock a. m., Wednesday, November 25th, 1896.

JUNE 3RD, 1897.

Court adjourned for the term.

JNO. J. HAWKINS, *Judge.*

52 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai, June Term, 1897.

JUNE 7TH, 1897.

Hon. J. J. Hawkins, judge, presiding.

B. F. THOMPSON, Plaintiff,
vs.
D. M. FERRY, SIMON J. MURPHY, and CHARLES C. BOWEN, Defendants. } No. 2618.

On motion of plaintiff case set July 9th.

June Term, 1897.

JULY 21ST, 1897.

Hon. R. E. Sloan, judge, presiding.

Court met at 10 o'clock a. m., Wednesday, July 21st, 1897.

B. F. THOMPSON, Plaintiff,
vs.
D. M. FERRY, SIMON J. MURPHY, and CHARLES C. BOWEN, Defendants. } No. 2618.

By consent case set Aug. 19th, 1897.

53 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai, June Term, 1897.

AUGUST 12TH, 1897.

Hon. R. E. Sloan, judge, presiding.
Court met at 10 o'clock a. m., Thursday, Aug. 12th, 1897.

B. F. THOMPSON, Plaintiff,
vs.
D. M. FERRY ET AL., Defendants. } No. 2618.

On motion of R. E. Morrison, Esq., demurrer to complaint set for hearing Aug. 13th, 1897.

June Term, 1897.

AUGUST 13TH, 1897.

Hon. R. E. Sloan, judge, presiding.
Court met at 10 o'clock a. m., Friday, Aug. 13th, 1897.

B. F. THOMPSON, Plaintiff,
vs.
D. M. FERRY ET AL., Defendants. } No. 2618.

The demurrer to the complaint herein, coming on to be heard, was argued by T. W. Johnston, Esq., counsel for defendants, supporting, and by R. E. Morrison, Esq., for plaintiff, opposing, and, being fully argued, was overruled; to which ruling of the court defendants, by their counsel, then and there in open court duly excepted.

54 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai, June Term, 1897.

AUGUST 19TH, 1897.

Hon. R. E. Sloan, judge, presiding.
Court met at 10 o'clock a. m., Thursday, Aug. 19th, 1897.

B. F. THOMPSON, Plaintiff,
vs.
D. M. FERRY ET AL., Defendants. } No. 2618.

Comes now this cause on for trial, and the respective parties being present by their counsel, Messrs. Morrison and Morrison, for plaintiff, and T. W. Johnston, Esq., for defendants, and answering ready for trial, and a jury having been waived, the court, sitting without a jury, proceeded with the trial, and witnesses M. E. Collins and T. W. Johnston were sworn and testified for the plaintiff, and documentary evidence was offered and admitted on part of plaintiff, and plaintiff rested case.

Witnesses G. W. Vickers, Jesse A. Robinson, J. F. Foster, and J. R. Lowry were called, sworn, and testified on behalf of defendants, and documentary evidence (noted by reporter) was offered and admitted on the part of the defendant.

Further hearing was continued until August 20th, 1897.

55 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai, June Term, 1897.

AUGUST 20TH, 1897.

Hon. R. E. Sloan, judge, presiding.
Court met at 10 o'clock a. m., Friday, Aug. 20th, 1897.

B. F. THOMPSON, Plaintiff,
vs.
D. M. FERRY ET AL, Defendants. } No. 2618.

Respective parties announce case closed. The evidence being closed, the case was fully argued by respective counsel and submitted for decision.

OCTOBER 30TH, 1897.

Court adjourned for the June term, 1897.

R. E. SLOAN, *Judge.*

56 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai, November Term, 1897.

DECEMBER 21ST, 1897.

Hon. R. E. Sloan, judge, presiding.
Court met at 10 o'clock a. m., Tuesday, December 21st, 1897.

B. F. THOMPSON, Plaintiff,
vs.
D. M. FERRY ET AL., Defendants. } No. 2618.

This cause, having heretofore been heard by the court, *and* was fully argued by respective counsel and submitted, and now, the court being advised in the premises, files its findings in favor of the defendants and order that judgment be entered herein accordingly.

Comes now plaintiff and files his motion for a new trial; which motion for a new trial is by the court overruled; to which ruling of the court plaintiff then and there in open court duly excepted.

Comes now plaintiff and gives notice in open court of appeal to the supreme court of the Territory of Arizona from the judgment rendered herein and from order of the court overruling plaintiff's motion for a new trial and from the whole thereof.

Now, on motion of plaintiff, it is ordered that plaintiff have sixty (60) days from the date hereof in which to file bill of exceptions and statement of facts and bond on appeal.

November Term, 1897.

MAY 28TH, 1898.

Court adjourned for the term.

R. E. SLOAN, *Judge.*

57 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

THOMPSON vs. FERRY ET AL. } # 2618. Reporter's Transcript. Filed at 3 o'clock p. m., Jul- 7, 1898. J. M. Watts, Clerk.

Hon. Richard E. Sloan, P. J.
Morrison & Morrison, for pl'ff.
T. W. Johnston, " d'f'ts.

PRESCOTT, ARIZONA, *August* 19, 1897.

Reporter's Transcript.

The above cause came on to be heard on the above date in said court, and, all parties announcing ready and a jury being expressly waived by respective counsel for plaintiff and defendants, the cause was thereupon heard before the Hon. Richard E. Sloan, judge, and the following oral and documentary evidence was introduced and proceedings had therein:

By the COURT: Unless there is objection, you will proceed to trial with the answer already in——

By Mr. MORRISON: Not at all. If I understand the rule, if an amended complaint is filed the answer that was filed to the
58 original complaint, so far as the merits are concerned——

By the COURT: Our statute so provides where there was a general denial, but any special defence perhaps, technically and strictly, should be pleaded against as amended answer.

By Mr. MORRISON: Let the record show, if Mr. Johnston desires, that the answer to the original complaint shall stand as the answer to the amended complaint.

By the COURT: Very well.

By Mr. JOHNSTON: Put it correctly, that the case is tried upon the last amended complaint and the amended answer of the defendants. That is the situation. I can see how a plaintiff, if he was industrious, could prevent a defendant from ever getting ready to try his case. He could come in every morning with an amended complaint. However, we understand it and will go on.

Offers of Plaintiff.

Pleadings read by respective counsel.

By Mr. MORRISON: Counsel in this case have signed and filed a stipulation, by the terms of which, and also the verbal understanding of counsel, we will not be required to produce original deeds, nor will we be required to comply with the rule of the statute to file certified copies of the instruments in the clerk's office, and also that we can offer — make our offer of record evidence by referring to the book and page of the record in the recorder's office, stating what the particular instrument conveys.

By M-. MORRISON: The plaintiff offers in evidence the
59 location notice of the Hamilton mining claim, made by William Gavin the 27th of September, 1875.

By the COURT: I think you both claim from a common source.

By Mr. MORRISON: Yes, sir.

By the COURT: Is it necessary to go beyond that common source?

By Mr. MORRISON: I desire to introduce them for the purpose of showing the interest as it existed at the time that mortgage was given, so the court can have it clearly before his mind.

By Mr. JOHNSTON: My silence may be misconstrued. These defendants do not claim—that is to say, they have two claims; they say that their grantor was E. M. Dickey, who was grantee of the Government. There was a date in the early title to each of these claims, when the record seems to show that the entire title was in M. E. Collins. My silence might be misconstrued, I say.

By the COURT: Proceed and show what title you have.

By Mr. JOHNSTON: I think the title to both of these mines ought to be in this abbreviated form before the court. There is no difference between us on those things.

By Mr. MORRISON: No, sir.

By the COURT: Proceed, then.

By Mr. MORRISON: Notice of location is recorded in Book C 3 of Mines, page 416, office of the county recorder of Yavapai county, Arizona.

We next offer in evidence a deed from William Gavin to Eliza P. Hitchcock, 24th of January, 1876, conveying an undivided
60 two-thirds interest in the Hamilton mining claim. That deed is of record in Book 7 of Deeds, page 418, in the county records. That left title to the Hamilton, two-thirds in Eliza P. Hitchcock and one-third in Gavin.

We next offer deed from Eliza P. Hitchcock, by her attorney-in-fact, Charles E. Hitchcock, and William Gavin, by his attorney-in-fact, Charles E. Hitchcock, to John M. Roberts, dated April 17th, 1876, conveying all interest in and to the Hamilton mining claim. This deed is recorded in Book 7 of Deeds, page 493.

By the COURT: Who is grantee in the deed?

By Mr. MORRISON: The grantee in this case is John M. Roberts; all title in Roberts.

By Mr. JOHNSTON: He subsequently sells the property?

By Mr. MORRISON: That shows it all.

From this point the abstract of the Poland-Hamilton is identical. We will now go back and take up the location notice of the Poland mining claim.

By Mr. MORRISON: We offer in evidence the location notice of the Poland mining claim, described in the complaint, located by D. R. Poland August 2nd, 1875, notice of location recorded in Book C 3 of Mines, page- 309, 310, of said county records.

We offer in evidenee a deed from John M. Roberts and Davis R. Poland to Charles W. Pardridge *et al.* to all of the Poland and Hamilton mining claims, dated March 18th, 1880, recorded in Book 12 of Deeds, at page 269 (385, 386?).

61 We next offer in evidence a deed from C. W. Pardridge *et al.*, same as above—that is, Charles W. Pardridge, Edwin Pardridge, and Charles J. Stokes are the grantees in the former deed, and in this deed Charles W. Pardridge and the same parties convey to Edward W. Russell.

By Mr. JOHNSTON: That is a deed from Charles W. Pardridge?

By Mr. MORRISON: No, sir; Charles W. Pardridge *et al.*, being the same parties as the grantees in the previous deed. This deed is dated the first of December, 1880 (1881?), and conveys all interest in the Poland and Hamilton mining claims, described in the complaint.

By Mr. JOHNSTON: Let us confer about that date. Our records show it is dated December 1st, 1881. Our stipulation goes to the effect, where we agree, of course, — might introduce the deed in this sort of way. Where we differ the original or the certified copy or, at least, an examination of the record by somebody to determine it——

By Mr. MORRISON: Just make a note of it. We will see. That deed conveyed all interest in the Poland and Hamilton and placed all of the title in Russell—both claims.

We next offer deed from Edward W. Russell to Charles C. Lane and John Howell, October 5th, 1882, conveying an undivided one-half interest (Appen., page 153).

By Mr. JOHNSTON: Our record shows October 25th.

By Mr. MORRISON: We have it October 5th. An undivided
62 one-half interest, deed being recorded in Book 16 of Deeds, at page 262, of said county records.

By Mr. JOHNSTON: 252.

By Mr. MORRISON: That is right—252.

That left title to an undivided one-half interest in Lane and Howell and an undivided one-half interest in Russell.

We offer in evidence deed from Edward W. Russell to M. E. Collins. That deed is dated October 25th, 1882, by which Russell conveys to Collins all of his interest in the Hamilton and Poland mining claims. That deed is recorded in Book 16 of Deeds, page 267, of said county records, title then being to an undivided one-half interest in Collins and an undivided one-half interest in Lane and Howell. (See Appen., page 156.)

We next offer in evidence the mortgage, or a mortgage, from Marcellus E. Collins to John M. Roberts, dated October 25th, 1883, by which Collins conveys to John M. Roberts all his interest in the Hamilton and Poland (see Appen., page 159) mining claims to secure the payment of a promissory note, which is described in the mortgage.

By the COURT: Have you that—a copy of the mortgage?

By Mr. MORRISON: We can have the record up here.

By the COURT: It might possibly be important to have the record of that mortgage, so as to have all the recitals. You will have a copy of the mortgage here?

By Mr. MORRISON: This mortgage is recorded — Book 3 of
63 Mortgages, at page 14, of said county records.

By Mr. JOHNSTON: We have a copy of it in the proceedings——

By Mr. MORRISON: In the complaint the judgment-roll——

By Mr. JOHNSTON: In the foreclosure; my recollection is there is a copy there.

By Mr. MORRISON: Case that was brought to foreclose this mortgage recites in *hæc verba* this mortgage.

We offer in evidence——

It might be suggested, according to the description of the Hamilton, as set out in this mortgage, and also as alleged in defendants' answer, that this Hamilton mine was located by C. E. Hitchcock; that that is a vital mistake, because the location of this was not made by Hitchcock at all.

By Mr. JOHNSTON: There are other elements of description which identify the claim.

By Mr. MORRISON: Yes, sir; there is no question about that. There is an error in description, of which no advantage is sought to be taken. For the information of the court, you go back to the location notice, and you will find it is one William Gavin and not C. E. Hitchcock.

By Mr. MORRISON: After the mortgage we offer in evidence deed from Charles C. Lane to Marcellus E. Collins, dated November 14th, 1883.

By the COURT: What was the date of the mortgage?

By Mr. MORRISON: October 25, 1883. The date of the
64 deed is the 14th of November, 1883, acknowledged the 16th of November, 1883, conveying an undivided one-fourth interest in the Poland and Hamilton mining claims, and this deed is recorded in Book 18 of Deeds, at page 452. (See Appen., page 163.)

Title then being three-fourths in Collins, one-half encumbered, and one-fourth in Howell.

We next offer in evidence a deed from M. E. Collins to Robert Schofield, dated November 14th, 1883, acknowledged November 16th, 1883, and conveying an undivided one-fourth interest in the Poland and Hamilton mining claims. It is recorded in Book 18 of Deeds, page 384. Date of record is December 15th, 1883 (Appen., p. 166).

Next we offer in evidence deed from John Howell to M. E. Collins, dated November 16th, 1880, acknowledged December 8th, 1883, conveying an undivided one-fourth interest in and to the Poland and Hamilton mining claims. This deed is recorded in Book 19 of Deeds, at page 263. (See Appen., p. 169.)

I desire to say that according to the face of this deed it is dated the 16th of November, 1880. That is an impossible date, apparantly, for the reason that Howell did not acquire title to this property at all in 1880. He did not acquire title until 1882, and, besides that, Mr. M. E. Collins is present and we will put him on as a witness to testofy as to the fact as to when that deed was actually made. In my judgment, the deed was made in 1883, and a mistake

was made in not filling out the blank properly—the form of deeds—
the form having 80 and having been a blank after that, and
65 the acknowledgement, as you see, was December 8th, 1883.

By Mr. JOHNSTON: That will be a matter of evidence.

By the COURT: Why not put that in right now? I think it would be more logical.

MARCELLUS E. COLLINS, called and duly sworn on behalf of the plaintiff, testified as follows:

Direct examination by Mr. MORRISON:

Q. What is your name?
A. Marcellus E. Collins.
Q. Where do you live?
A. I live in Pontiac—in Phœnix, in this county. I had lived in Pontiac; I get them mixed often.
Q. Phœnix, Arizona?
A. Yes, sir.
Q. Were you ever the owner of any interest in the Poland and Hamilton mining claims, in this county?
A. Yes.
Q. Do you remember any purchase made by you of the interest of a man named John Howell, an undivided one-fourth interest, in the Poland and Hamilton mining claims, in this county?
A. Yes, sir.
Q. Do you remember as to the year, what was the date of the deed, if there was a deed, by which you acquired that interest?
A. Well, it was in the fall of 1883.

66 By Mr. JOHNSTON: Just a minute. I think I ought to object to the introduction of that evidence in that way as being an effort to contradict any vary a written instrument by parol testimony. I think it is competent, possibly, to prove that there was a sale and a purchase, and that there was a deed in the ordinaay form passed at that particular time, and if he remembers it there was a mistake made in the date of this particular deed, but in the form in which counsel has put the question I think I might object to it.

By Mr. MORRISON: I withdraw that question. I will put the question this way:

Q. Please state when, if at all, you purchased from a man named John Howell an undivided one-fourth interest in the Poland mining claim, in this county.
A. My best recollection now is it was in December, 1883.
Q. 1883?
A. Yes; I think that was it. It was about a month after we closed the trade with Lane——
Q. When did you close the trade with Lane?
A. I think that was along in November. At that time we got Lane to get us an option from Howell for his quarter interest; that was about a month afterwards that we closed the deal up.

Q. Was there a deed given at that time?
A. Yes, sir.
Q. By Howell to you?
67 A. Yes.
Q. It was delivered to you?
A. Yes.
Q. Have you the original deed?
A. No, sir. I do not know what in the world became of it. It was a long while ago.
Q. You don't know what became of it?
A. No; I do not know whether I delivered that up to Schofield or what I did with it; I have no recollection.
Q. I will ask you, if the deed is dated 1880, what do you say as to that being the correct date?
A. I know it to be wrong.

By Mr. JOHNSTON: I object to that question.
By Mr. MORRISON: It is made for the purpose of explaining the apparent mistake in the date of the deed.
By the COURT: Is it apparent upon the face of the deed?
By Mr. MORRISON: On the face of the record itself.
By the COURT: It is on the face of the record, but not on the face of the deed itself?
By Mr. JOHNSTON: The trouble is we haven't the deed. If we had the deed, this would all be proper.
By Mr. MORRISON: But we haven't the deed. Mr. Collins says he does not know where it is; he does not know what became of it.
By Mr. JOHNSTON: There is a way to do this—by exclusion of that sort of thing. I think counsel ought to conform to the
68 rule. If the court please, if counsel will pardon me, our object here is to get at the facts—get the facts clearly before the court most expeditiously, most economically. I will withdraw the objection to that; I think it may be admitted.
By the COURT: Very well. Answer the question.

A. I will explain that. The deed was put in escrow here in the bank. I did not get it for a month afterwards.

By Mr. JOHNSTON: I think it may be admitted that this deed here from Howell to Collins, which counsel has offered in evidence, which on its face is dated November 16th, 1880, should be dated—as a matter of fact, was dated—of that month and day in 1883. That will save lots of time.
By Mr. MORRISON: Yes, sir; for all purposes hereafter we will consider this deed as of 1883.
By Mr. JOHNSTON: Yes.
By the COURT: That is all, Mr. Collins.
By Mr. MORRISON: We offer deed from M. E. Collins to B. F. Thompson, plaintiff herein, as alleged in the complaint, dated August 18th, 1884, acknowledged August 19th, 1884, conveying an undivided one-quarter interest in the Poland and Hamilton mining

claims, in this county. That deed is recorded in Book 19 of Deeds, page 401, of said county records. (See Appen., p. 172.)

We next offer in evidence the judgment-roll and the record of judgment in the district court of this county in the case of John M.
Roberts, plaintiff, *vs.* M. E. Collins, Robert Schofield, and
69 B. F. Thompson, defendants, number 1387.

By the COURT: Is that the foreclosure?

By Mr. MORRISON: That is the foreclosure record; yes, sir. (See Appen., pages 175–190.)

We next offer in evidence the certificate of sale under this judgment in this case, the judgment-roll of which has just been offered, and the record of judgment made on the 17th of March, 1887, showing John M. Roberts, the judgment creditor, to be the purchaser, the certificate being recorded in Book 23 of Deeds, page 95 (App., p. 191).

We offer sheriff's deed to John M. Roberts, the purchaser, dated September 30th, 1887, and recorded in Book 23 of Deeds, at page 449. (See Appen., p. 194.)

We next offer deed from J. R. Lowry, administrator of Roberts' estate, to E. M. Dickey, July 20th, 1891, conveying all interest of Roberts' estate in the Poland and Hamilton mining claims. The deed is recorded in Book 30 of Deeds, at page 197, of said county records (App., 199).

We next offer in evidence the records of the land department, showing application for patent by E. M. Dickey for the Poland mining claim, and also the application and the records and files in the application for patent by E. M. Dickey for the Hamilton mining claim.

We also offer the patent to the Poland mining claim to E. M.
Dickey, May 1st, 1893, recorded, Book 39 of Deeds, page 633
70 *et seq.*, of the county records. That is for the Poland.

By Mr. JOHNSTON: You have got the record wrong. What date?

By Mr. MORRISON: The Poland was issued the first of May, 1893; is that correct?

By Mr. JOHNSTON: Yes, sir; you haven't the record; page 626 it ought to be. The other is 623.

By Mr. MORRISON: Yes; 626.

We offer in evidence the patent issued to Dickey to the Hamilton mining claim the 20th of June, 1893, and recorded in Book 39 of Deeds, at page 626, we have it; you have it 623.

By Mr. JOHNSTON: Either you or ourselves are wrong.

By Mr. MORRISON: It may be reversed here. We will go to the recorder's office and settle these propositions.

We offer in evidence a deed from E. M. Dickey to F. M. Murphy, dated the 10th of March, 1892, conveying an undivided one-half interest in the Poland and Hamilton mining claims, which deed is recorded, Book 31, page 82.

We next offer in evidence deed from E. M. Dickey to C. D. Arms, March 2nd, 1894, conveying an undivided one-half interest in the

Poland and Hamilton mining claims, recorded, Book 36 of Deeds, page 3, of said county records.

We next offer deed from F. M. Murphy to S. J. Murphy, D. M. Ferry, and Charles C. Bowen, defendants herein, conveying an undivided one-half interest in the Poland and Hamilton mining claims, dated July 7th, 1894, and recorded in Book 36 of Deed, at
71 page 341, of said county records.

By Mr. JOHNSTON: Do you mean 2nd or 7th?

By Mr. MORRISON: The 7th.

By Mr. JOHNSTON: We have it dated the second.

By Mr. MORRISON: July 7th, 1894.

By Mr. JOHNSTON: Make a memorandum of that for verification.

By Mr. MORRISON: We offer deed from C. D. Arms to E. B. Gage, May 4th, 1895, conveying an undivided one-half interest in and to the Poland and Hamilton mining claims; deed recorded in Book 35 of Deeds, page 574, of said county records.

We next offer deed from E. B. Gage to Murphy, Ferry, and Bowen, defendants in this case, conveying an undivided one-half interest in the Poland and Hamilton mining claims; deed dated March 18th, 1895.

By Mr. JOHNSTON: Make a note of that. We have that dated May 13th, 1895.

By Mr. MORRISON: Deed recorded — Book 35 of Deeds, page 590.

The next deed we offer is from Schofield to Thompson, plaintiff in this case, dated the 23rd of July, 1896, conveying an undivided one-fourth interest in the Poland and Hamilton mining claims, recorded in Book 42 of Deeds, page 118.

By the COURT: Does that complete your record testimony?

By Mr. MORRISON: I think that completes the record testimony, so far as the plaintiff is concerned; yes, sir.

Recess.

72 By Mr. MORRISON: I desire before proceeding to make correction of some dates: Deed from C. W. Pardridge to Edward W. Russell (see page 61), date should be 1881. We gave it 1880. An examination of the record shows it should be 1881.

Next, in the deed from Russell to Land and Howell (see page 61) it should be the 25th of October, 1882, instead of the 5th of October, and the page of the record should be page 252 instead of 262.

Next, in the deed from Murphy to the defendants (see page 70) the date of the deed should be July 2nd, 1894, instead of July 7th.

Next, in the deed from E. B. Gage to Murphy, Ferry, and Bowen, the defendants (see page 71), the date of the deed should be May 13th, 1895, instead of May 18th.

Next, the page of the record of the Poland patent is 626. That is the way I had it first, and I changed it again, and the page of the record of the Hamilton patent is 623 instead of 626. I think the dates are all right.

JOHNSTON, D. EX.

T. W. JOHNSTON, called and duly sworn on behalf of the plaintiff, testified as follows:

Direct examination by Mr. MORRISON:

Q. You are T. W. Johnston, the attorney for the defendants in this case?

A. Yes, sir.

73 Q. On the 21st of September, 1896, were you the attorney of the defendants in this action?

A. Yes and no.

Q. Yes and no, you say?

A. Yes, sir.

Q. On that date—will you please look at this letter?

A. I signed this letter.

Q. That is your signature to that letter?

A. Yes, sir; that is my signature.

Q. At the time you wrote that letter were you the attorney for the defendants in this action?

A. Yes and no; and that answer, I am serious in making it, and therefore shall explain it. The explanation is that F. M. Murphy is one of the creditors of some interest in the Hamilton and Poland mining claims which is involved in this lawsuit; and these defendants, Ferry, Bowen, and S. J. Murphy, when this controversy arose, looked to their grantor, F. M. Murphy, for protection against the threatened lawsuit; and F. M. Murphy, who is and was my client, employed me to protect his grantees, and I was employed by F. M. Murphy and by him paid to attend to this lawsuit. As to whether these defendants are my clients in any other sense than I am directed to protect their interests in this lawsuit, I could not say.

74 Q. Was it because of the fact you were representing S. J. Murphy, Bowen, and Ferry, the defendants in this case, that you wrote that letter?

A. No, sir; it was because of the fact that I was representing their grantor, F. M. Murphy, who felt obliged to protect his grantees in the title which he had conveyed. It was under his direction and at his request that I have done everything which I have previously done in this case. I never had any connection with either of the defendants, directly or indirectly, nor have I ever received any compensation from either of them.

Q. Who is the Mr. Ferry referred to in that letter, his initials?

A. As I recall them, D. M.

Q. One of the defendants in this case?

A. Yes; one of the defendants in this case.

Q. When you say associates of Mr. Ferry, whom did you refer to?

A. I presume I referred to his co-owners, who are likewise here *is*——

Q. Codefendants?

A. Codefendants in this suit.

By Mr. MORRISON: I think that is all. I offer this letter.

By Mr. JOHNSTON: May I ask what the purpose of this is?

By Mr. MORRISON: For the purpose of showing that this is the first notice we had in any way of the fact that our title in the property was denied actually, and for the purpose, if there was any dispossession or ouster, it was at that time.

75 By Mr. JOHNSTON: I object, and move to strike out this testimony as incompetent and immaterial and not tending to show any ouster or denial of title, and even if it did it does not in anywise contradict the allegation in the amended answer to the effect that that ouster, the first ouster of the plaintiffs, was in 1886 or 1887, and the second, if it was possible to have had a second, was in July, 1891.

And for the additional reason that the writer of the letter was not an attorney, either of Ferry or his codefendants, under the testimony.

By the COURT: I fail to see the materiality of it—the competency of it—if counsel will give me the benefit of his views as to what this shows.

By Mr. MORRISON: I confess, as I understand the question of dispossession or ouster, I still maintain the position we do not have to prove in an action of this kind, action to try title or action in partition or an action to declare a distribution. We offer this evidence for the purpose of sustaining the allegation in our complaint that on that date that for the first time our title was denied by the defendants in this action.

By the COURT: It might be material to show that defendants do claim an interest.

By Mr. MORRISON: Yes.

By the COURT: In these——

By Mr. MORRISON: Our interest that we claim——

76 By the COURT: That is unnecessary, inasmuch as their answer sets that up.

By Mr. JOHNSTON: We say we claim it all.

By the COURT: So it is not necessary to prove that fact. I will sustain the objection to this, inasmuch as I cannot see the materiality of it nor the competency of it, inasmuch as the answer eliminates that as an issue in the case.

By Mr. MORRISON: That is the case for the plaintiff.

Defense.

Offers of Defendants.

By Mr. JOHNSTON: The defendants now offer in evidence—being required, as we understand it, to prevail in this action on the strength of our own title and not the weakness of theirs—deed from E. B. Gage to S. J. Murphy, D. M. Ferry, and C. C. Bowen, defendants.

By the COURT: Was that deed introduced by the plaintiffs?

By Mr. JOHNSTON: Yes.

By Mr. MORRISON: Yes.

By the COURT: Do you think it necessary to put the same evi-

dence in again? If it is in for one purpose, isn't it in for all purposes?

By Mr. JOHNSTON: That is true. We have a statute, thirty-four hundred and something, which I do not understand, I will frankly admit, a phrase of which seems to state that I have got to do
77 certain things if I want to avail myself of the other side, so far as my title is concerned; and, then, there are some features in my title which the plaintiff has omitted, and as we have gotten the thing in such a shape, by, as I conceive, intelligent consideration, that it can be done very quickly, I would vastly prefer to do it, unless there is some objection. Let me have that stipulation.

By Mr. MORRISON: Section 3144.

By Mr. JOHNSTON: 3144. We have waived—that is to say, we have stipulated that we would not bother with some features of that section of the statute, in which clause we find the statement: "Provided, that such certified copies shall not be evidence of title in the defendant unless offered in evidence by him, and the plaintiff shall not be precluded from making any legal objection to the same or the original thereof when introduced by the defendant."

I do not want to have any obligations of that kind when I can obviate it by ten minutes of your honor's time.

By the COURT: Very well.

By Mr. JOHNSTON: Dated May 13th, 1895, conveying an undivided one-half interest in the Poland and Hamilton mining claims to these defendants, recorded May 18th, 1895, Book 35 of Deeds, page 590, in the office of the county recorder of Yavapai county, Arizona.

78 We offer deed from C. D. Arms to E. B. Gage, dated May 4th, 1895, conveying an undivided one-half interest to the Poland and Hamilton mining claims to said E. B. Gage, recorded May 4, 1895, Book 35 of Deeds, page 574, records of Yavapai county, Arizona Territory.

By Mr. MORRISON: To the introduction of these two deeds plaintiff desires to object that, according to the contention of the plaintiff, at the time Arms conveyed to Gage and Gage to Murphy an undivided one-half interest Arms had no undivided one-half interest to convey, Dickey having previously conveyed to F. M. Murphy the only undivided one-half interest which we claim he had in the property.

By the COURT: It may be admitted subject to objection. It may be presented upon the argument.

By Mr. MORRISON: Yes, sir; it is understood the objection goes to both of those deeds.

By the COURT: Yes, sir.

By Mr. JOHNSTON: The deed of F. M. Murphy to D. M. Ferry, C. C. Bowen, and S. J. Murphy, defendants in this case, dated July 2nd, 1894, conveying an undivided one-half interest in the Hamilton and Poland mining claims, recorded August 16th, 1894, Book 36 of Deeds, page 341, records of Yavapai county, Arizona.

Next, deed from E. M. Dickey to C. D. Arms, dated March 2, 1894,

conveying an undivided one-half interest in and to the Hamilton and Poland Mining claim-, recorded March 17th, 1894, Book
79 36 of Deeds, pages 3 to 6, records of Yavapai county, Arizona.

By Mr. MORRISON: The same objection noted to the introduction of that deed.

By the COURT: Very well.

By Mr. JOHNSTON: Deed of E. M. Dickey to F. M. Murphy, dated March 10th, 1892, conveying an undivided one-half interest in and to the Poland and Hamilton mining claims, recorded March 11th, 1892, in vol. 31 of Deeds, pages 82 to 85, records of Yavapai county, Arizona.

Next, amended notice of location of the Poland mining claim by E. M. Dickey, dated July 15th, 1892, recorded in Book 34 of Mines, page 472, records of Yavapai county, Arizona.

By Mr. MORRISON: We desire to object to the introduction of that amended notice of location; that is offered for the purpose of establishing title from that location notice down to the date of the patent.

By Mr. JOHNSTON: Do you want me to state the purpose?

By Mr. MORRISON: Yes.

By Mr. JOHNSTON: One of the purposes of the introduction of the amended notice of location is—

To show one of the various acts which E. M. Dickey did in connection with this mining claim—that he went into the adverse, notorious, and exclusive possession of it, looking toward becoming a factor in what we say was an ouster and disseisin of the plaintiffs, and as a part, we conceive, necessarily of our establishing our
80 title to that claim, so I introduce it for both purposes.

By the COURT: It may be introduced subject to objection. You may argue its legal effect hereafter.

By Mr. JOHNSTON: Notice of location of the Poland mining claim by E. M. Dickey, which states that it is a relocation of the Poland mining claim, dated December 14th, 1891, recorded December 15th, 1891, Book 33 of Mines, page- 17, 18.

By Mr. MORRISON: We object to the introduction of that relocation, notice of location, for the reason that it is, as a matter of fact, an amended location notice, made for the purpose of correcting the boundaries and making the description and limitations of the mining claim more accurate and correct.

By the COURT: It shows on its face what it is.

By Mr. MORRISON: Yes, sir.

By Mr. JOHNSTON: It shows relocation of the Poland mining claim.

By the COURT: It will be introduced subject to objection.

By Mr. MORRISON: Of course, we will argue it.

By Mr. JOHNSTON: We offer the original location notice of the Poland mining claim by D. R. Poland, made August 2nd, 1875, dated August 2nd, 1875, filed for record August 6th, 1875, and recorded in Book C 3 of Mines, records of Yavapai county, at folios 309, '10.

We offer in evidence the deed from J. M. Roberts, by his administrator, J. M. Lowry, to E. M. Dickey, dated July 20th, 1891, convey-

ing all the right, title, and interest of the said Roberts, de-
81 ceased, to the Poland and Hamilton mining claims to said E. M. Dickey, recorded July 27th, 1891, in Book 30 of Deeds, page 197, records of Yavapai county, Arizona.

By Mr. MORRISON: We object to the introduction of that deed by the defendant-, as claiming title to all of the Poland and Hamilton mining claims; that he only passes title to an undivided one-half interest.

By the COURT: Admitted subject to objection.

By Mr. JOHNSTON: We offer the order of the probate court confirming the sale of the Poland and Hamilton mining claims by said J. R. Lowry, as administrator of the estate of John M. Roberts, to said E. M. Dickey, dated July 7th, 1891, and recorded July 20th, 1891, Book 30 of Deeds, page 184, records of Yavapai county, Arizona.

By Mr. MORRISON: We object to the introduction of that instrument, order of confirmation, on the part of the defendants, in so far as it applies to the undivided one-half interest in the Poland and Hamilton claimed by plaintiff.

By the COURT: It may be admitted subject to objection.

VICKERS.

By Mr. JOHNSTON: I want to introduce at this stage, in order to make my proof logical, Dr. Vickers.

G. W. Vickers, called and duly sworn on behalf of the defendants, testified as follows:

82 Direct examination by Mr. JOHNSTON:

Q. I will put Mr. Vickers on the stand for one purpose now. State your name.

A. George W. Vickers.

Q. Your residence.

A. Prescott.

Q. Do you know E. M. Dickey, of whom I have been speaking and whose name is mentioned in the various deeds which have been offered in evidence here?

A. I do.

Q. What relation, if any, have you borne to him in connection with his business in Arizona?

A. Well, through Mr. Murphy, confidential relations with all of them for some time.

Q. Can you state whether E. M. Dickey ever made any application to any part of the Land Department of the United States for a patent to the Poland and Hamilton mining claims?

A. Through Mr. Murphy, as agent or attorney——

By Mr. MORRISON: We do not object to the introduction of the records and everything of that kind; no necessity of providing them.

By Mr. JOHNSTON: It is not required in the Land Office. I want

to prove an isolated fact, that at a date earlier than that you have alleged we made application to the surveyor general, which is a preliminary step, in order to obtain a patent to this land. It carries us back to December, 1891. We conceive it is important.

83 Q. Can you give about the approximate date of the first application by E. M. Dickey to any part of the Land Department of the United States for patent to the Poland and Hamilton mining claims?

By Mr. MORRISON: We object in so far as—we withdraw the objection.

A. I can say that application was made by Murphy to the surveyor general for order for survey some time in December, 1891.

Q. For whom did Mr. Murphy make that application?

A. For the owners of the claim, E. M. Dickey.

Q. That is all.

By Mr. MORRISON:

Q. That application was in writing?

A. I presume so. I state this from having in my possession a receipt from the surveyor general of the receipt of the money on the 21st of December, 1891, for those surveys for the Poland and Hamilton.

By Mr. JOHNSTON: Have you that receipt?

A. Yes, sir; I have.

By Mr. JOHNSTON: I think this proves itself. I offer in evidence, gentlemen, a receipt from J. P. Jackson, assistant treasurer of the United States, dated December 21st, 1891, which I will ask the stenographer to mark Exhibit "A" (25), purporting to certify that E. M. Dickey has deposited sixty dollars for the purpose of causing to be surveyed the Hamilton and Poland mining claims, having in view obtaining a patent, for the purpose of fixing the date on which the first application was made by Dickey to the Land De-
84 partment for a patent.

By Mr. MORRISON: The only objection I desire to make to the introduction of this receipt I do not think it is material or relevant, but I will not object to it on that ground; simply object to it to such extent as it may tend to establish any title whatever in the defendants in this action to the undivided one-half interest which the plaintiff in this action claims in the Poland and Hamilton mining claims.

By the COURT: It is admitted subject to your objection.

By Mr. JOHNSTON:

Q. I understood you to say, Dr. Vickers, did I not, that you know from memoranda and other sources that at or about the 20th of December, 1891, that E. M. Dickey made application to the surveyor general to cause to be surveyed the Poland and Hamilton mining claims?

A. Yes, sir; through Mr. Murphy, as agent.

Q. I understand that through Mr. Murphy, as agent, E. M. Dickey made the application?

A. Yes, sir; I presume so.

Q. That is all.

By Mr. MORRISON: That is all.

By Mr. JOHNSTON: The proceedings in the land office at Prescott, Arizona, had by E. M. Dickey as preliminary to and necessary to the obtaining of a patent from the United States Government to him of all or both of the Hamilton and Poland mining claims, I offer the proceedings which were preliminary to the obtaining
85 of a patent by E. M. Dickey. My judgment is that the patent itself carries with it the assumption that necessary and preliminary proceedings were had. As a precautionary measure, I offer those proceedings in both cases.

By Mr. MORRISON: I object to the introduction solely for the purpose in so far as they may tend to establish legal title or the equitable title——

By the COURT: You do not object to it on the ground of materiality?

By Mr. MORRISON: No, sir; I object to it, so far as the undivided interest of the plaintiff is concerned, in passing title to these defendants to all of the Poland and Hamilton mining claims.

By the COURT: It may be admitted subject to objection.

By Mr. JOHNSTON: I offer in evidence the patent of the United States Government to E. M. Dickey to the Hamilton mining claims, dated June 20th, 1893, recorded July 20th, 1896, in Book 39 of Deeds, page 623, Yavapai County records.

And the patent by the United States Government to E. M. Dickey, conveying to him the Poland mining claim, dated May 1st, 1893, recorded July 20th, 1896, Book 39 of Deeds, pages 626 *et seq.*, records of Yavapai county, Arizona.

By Mr. MORRISON: We object to the introduction in so far as it tends to establish title in the defendants to the undivided one-half interest which the plaintiff claims in the Poland and Hamilton mining claims.

86 By the COURT: Admitted subject to objection.

By Mr. JOHNSTON: We offer in evidence the deed from W. J. Mulvenon, sheriff of Yavapai county, Arizona, to J. M. Roberts, conveying the Poland and Hamilton mining claims to Roberts, dated September 30th, 1887, recorded October 15th, 1887, in Book 23 of Deeds, page- 449–452, records of Yavapai county, Arizona.

By Mr. MORRISON: We object to the introduction of this deed, the same objection as before, and the further objection that the sheriff did not possess the necessary authority to give a deed to all of the Poland and Hamilton mining claims, the judgment of foreclosure only justifying him to pass all the right, title, and interest of Collins in and to the Poland and Hamilton mining claims that he had at the date of the mortgage.

By the COURT: Admitted subject to objection.

By Mr. JOHNSTON: We offer sheriff's certificate of sale on fore-

closure, being the certificate of sale of W. J. Mulvenon, sheriff of said county, dated the 17th of March, 1887, filed in the office of the county recorder of Yavapai county on the 17th of March, 1887, and recorded in Book 23 of Deeds, pp. 95–97, it being the certificate of the sheriff to the effect that he has sold to J. M. Roberts the Poland and Hamilton mining claims under a proceeding of foreclosure therein described.

By Mr. MORRISON: The same objection as to the last one.

By the COURT: Yes; admitted subject to objection.

By Mr. JOHNSTON: We offer in evidence all of the proceed-
87 ings and papers in the case of J. M. Roberts, plaintiff, *vs.* M. E. Collins *et al.*, defendants, said case being in the district court of Yavapai county, Arizona Territory, being numbered 1387. I mean this offer to include all of the records of the said court connected with said case from the filing of the complaint up to and inclusive of the decree in the case and the judgment-roll. I believe there are some parts—some things in here which were not a part of the judgment-roll. There are some applications or affidavits about non-residents of defendants and some proceedings of that kind. In any event, I offer the whole record in evidence without explaining why; it will save time.

By the COURT: It may be admitted subject to objection.

By Mr. MORRISON: Same objection.

By Mr. JOHNSTON: I offer in evidence the *lis pendens* filed by Rush, Wells, and Howard, attorneys for plaintiff in the just-mentioned case of Roberts *vs.* Collins *et al.*, recorded August 31st, 1886, in Book 1 of *Lis Pendens*, page 199, in the records of Yavapai county, giving notice of the pendency of the foregoing suit and of the fact that it affects the title to the Poland and Hamilton mining claims.

By Mr. MORRISON: Same objection.

By the COURT: Same ruling. I do not see the purpose of a *lis pendens* in a foreclosure suit.

By Mr. JOHNSTON: There is this purpose: It will develop in the discussion of this case that we are seeking to prove notice,
88 both constructive and actual, to this plaintiff of what we have been doing in connection with the absolute and exclusive ownership of both of these mining claims.

By the COURT: It may be admitted subject to objection.

By Mr. JOHNSTON: I offer in evidence mortgage from M. E. Collins to J. M. Roberts, dated October 25th, 1883, conveying all of the interest of said Collins to the Poland and Hamilton mining claims to said Roberts, recorded in Book 3 of Mortgages, pages 14, 15, 16, 17, records of Yavapai county, Arizona.

By Mr. MORRISON: Same objection.

By Mr. JOHNSTON: I presume we will have the same ruling. I will not stop unless you require it.

By Mr. MORRISON: Go on.

By Mr. JOHNSTON: I offer in evidence deed from E. W. Russell to Collins, dated October 25, 1882, conveying an undivided one-half interest in the Poland and Hamilton mining claims to said Collins,

recorded November 6th, 1882, Book 12 of Deeds, page- 267–270, records of Yavapai county, Arizona.

By Mr. MORRISON: No objection.

By Mr. JOHNSTON: We offer deed from C. E. Lane to M. E. Collins, November 14th, 1883, conveying an undivided one-fourth interest in and to the Hamilton and Poland mining claims to Collins, recorded January 7th, 1884, Book 18 of Deeds, p. 451–'53, records of Yavapai county.

By Mr. MORRISON: No objection.

89 By Mr. JOHNSTON: We offer deed from John Howell to M. E. Collins, dated November 16th, 1880, it being the same deed which was offered in evidence by the plaintiff, and which has been admitted, and which has been admitted by both plaintiff and defendants to have been dated 1883, conveying an undivided one-fourth interest in the Hamilton and Poland mining claims to M. E. Collins, recorded June 18th, 1884, Book of Deeds 19, pp. 263, '64, records of Yavapai county, Arizona.

By Mr. MORRISON: It is understood that that date is considered to be 1883.

By Mr. JOHNSTON: Yes, sir; we have admitted it. I simply want to identify it.

We next offer deed from M. E. Collins to B. F. Thompson, dated August 18th, 1894, purporting to convey an undivided one-fourth interest in the Hamilton and Poland mining claim to B. F. Thompson, recorded August 19th, 1884, Book 19, Deeds, pages 301–'03, records of Yavapai county, Arizona.

We offer deed of said Collins to Robert Schofield, dated November 14th, 1883, purporting to convey an undivided one-fourth interest in the Hamilton and Poland mining claim- to R. Schofield, recorded December 15th, 1883, Book 18 of Deeds, p. 384, records of Yavapai county, Arizona.

By Mr. MORRISON: No objection.

By Mr. JOHNSTON: In addition I offer in evidence the original location notice of the Hamilton mining claim by William Gavin,

90 dated September 27th, 1875, recorded November 1st, 1875, Book C 3 of Mines, at folio 416, records of Yavapai county, Arizona.

I offer in evidence all of the deeds and conveyances affecting the Hamilton and Poland mining claim- which the plaintiff has already introduced in evidence and tracing the title of both of them, ultimately and finally, in M. E. Collins. I do not offer them in detail, because they have already been offered. I therefore adopt the offer which the plaintiff has made as mine.

That is the record evidence for the defendants.

Offers of record evidence of defendants closed.

M. E. COLLINS, recalled on behalf of the defendants, testified as follows:

Direct examination by Mr. JOHNSTON:

By the CLERK: You have been sworn?

A. Yes, sir.

By Mr. JOHNSTON:

Q. You have already been sworn and stated your age and residence?

A. My residence is Phœnix.

Q. You are the M. E. Collins, are you not, of whom we have been speaking in the trial of this case in connection with deeds and titles to the Poland-Hamilton mining claim-?

91 A. Yes, sir.

Q. At any time did you ever own or set up any claim to the Poland-Hamilton mining claim?

A. I used to own the claims.

Q. Both of them?

A. Yes, sir; both of them passed through me—my hands.

Q. Do you know a man named B. F. Thompson?

A. Yes, sir.

Q. Robett Schofield?

A. Knew them both.

Q. Had any business association with either or both in connection with the Poland-Hamilton mining claim at any time?

A. I did.

Q. What were the relations, if you know them, between Schofield and B. F. Thompson, the plaintiff in this case, at or about that time?

By Mr. MORRISON: We object to that as irrelevant.

By the COURT: What is the purpose of that?

By Mr. JOHNSTON: The purpose is, the record will show we had personal service upon Schofield, and I want to see what the relations between Schofield and Thompson were with reference to these particular claims, and likewise their business associations as a fact looking toward the possible notification, personally, of Thompson of the pendency of this litigation, Schofield having been notified in

92 person, and to see whether or not Schofield was not remaining in this country to act as the representative of Thompson in connection with his interests. It is for that purpose.

By Mr. MORRISON: I insist upon my objection. I do not see the relevancy upon the question of notice of pendency of this suit if this is shown by personal service of summons on one and service by publication on the other. The fact as to whether they were here or not in person——

By the COURT: The objection will be sustained to that. The record must stand or fall as it is made in the suit, it seems to me.

By Mr. JOHNSTON: I will put another question.

Q. Do you know whether or not there was any relation of agency, or will you state what relation there was, if you can, between this man Schofield and this man Thompson with reference to the Poland-Hamilton mining claim in connection with it?

By Mr. MORRISON: The same objection. I do not see the relevancy and I object to it as being immaterial and irrelevant.

By the COURT: If it is sought by this to show that there is an estoppel by the record on the part of this defendant by reason of proceedings

to foreclose the mortgage, then any testimony showing estoppel *in pais*, it seems to me, is irrelevant and incompetent.

By Mr. JOHNSTON: There is an allegation in the amended answer to the effect that estoppel not only is the result of the record,

93 but *in pais*. My notion was that if I could show that Thompson—that Schofield having been served personally and remaining in the country as Thompson's representative in connection with his interest out here, that it might follow from that, when the litigation began in regard to that property out there, it would be not unfair to infer that Schofield notified Thompson of what was going on, and there would be the estoppel *in pais*—not only notified him of the litigation, but possibly of our taking possession of this property. In any event, that is the reason I asked the question.

By the COURT: I have very grave doubts of the competency of the evidence, but it will be admitted, subject to objection, at present. You can discuss that in your argument.

By Mr. JOHNSTON:

Q. Referring to the Poland-Hamilton mining claims, situated in Yavapai county, and which are involved in this suit, state whether or not yourself, Thompson, and Schofield ever did anything looking toward the development or the working of these mining claims.

A. Yes, sir; we put up——

By Mr. MORRISON: Object to that as incompetent and immaterial.

By Mr. JOHNSTON: I am going to show that these men built a mill upon these claims; that they sought to work them, found it unprofitable; that they quit them, took their mill away, put it elsewhere, and respectively left the country, and that soon thereafter we foreclosed our mortgage and went into absolute possession.

By the COURT: You seek to show abandonment?

94 By Mr. JOHNSTON: Yes, sir.

By the COURT: Have you stated sufficient in your answer to show abandonment?

By Mr. JOHNSTON: Yes, sir.

By the COURT: If you have, I think it is competent.

By Mr. JOHNSTON: I think so.

By Mr. MORRISON: I object to that question for the reason that, according to the statement of counsel, it does not tend to establish any issue in this case, so far as I can see—there is, as I remember it, no allegation of abandonment—and the fact that a man has a location, has purchased an interest in a mining claim, and goes off and leaves it is no evidence of abandonment.

By the COURT: It does not establish abandonment. It might tend, with other facts, to show abandonment.

By Mr. JOHNSTON: Of course I have to prove one fact at a time.

By the COURT: In itself it does not prove abandonment.

By Mr. MORRISON: No, sir.

By Mr. JOHNSTON: I do not claim it does. If I follow it up by other facts, it may ultimately result in abandonment.

By the COURT: It may be admitted subject to that qualification,

subject to objection. It must be connected with affirmative proof showing abandonment or by facts which indicate it.

A. I was going to state we put up the mill and worked the ore.
Q. Whom do you mean by "we"?
A. Schofield, Thompson, and myself. We were all there
95 when the mill was working.
Q. Do you recall about the date of that?
A. No, sir; I could not tell that. It was along in the——

By Mr. MORRISON: This line of evidence all goes in subject to the same objection.

By the COURT: Yes, sir; it is not necessary to make formal objection.

By Mr. JOHNSTON: I suppose we might understand all of the evidence on both sides subject to objection at the end, so far as objection goes.

Q. Do you remember a man named John M. Roberts?
A. Yes, sir.
Q. Do you recall giving John M. Roberts a certain mortgage upon your interest in the Poland and Hamilton mining claims?
A. Yes, sir.
Q. If the correct date of the mortgage is October 25th, 1883, are you able to state whether you and Thompson and Schofield constructed this mill upon the Poland and Hamilton mining claims before or after you executed the mortgage?
A. It was after.
Q. About how long?
A. My recollection is we went right to work that winter and put it up and had it running by the next. I wouldn't state. We went to work at the mill we bought down on Turkey creek. It was moved up there. It has been so long ago I cannot recollect that.
96 Q. Was it the winter of 1883, the date of your giving the mortgage, — soon after?
A. It was shortly after that.
Q. What were the results of your efforts in connection with the use of that mill and the working of the ore upon the Poland and Hamilton mining claims?
A. That was at 1883 that the deeds were made.
Q. Yes, sir.
A. It might have been longer before we got the mill to work. I could not give anywhere near that time, it has been so long ago. We put the mill up; put in jigs and one thing and another; had Professor George (?) put them in place; the expert.

By Mr. MORRISON:

Q. When you say "us"?
A. When I say "us" I mean Schofield, Thompson, and myself. It was a flat failure.

By Mr. JOHNSTON:

Q. What did you and Schofield and Thompson, more particularly the latter, do with reference to the mill and improvements after you discovered it was a flat failure?

A. Like other mining enterprises, we were so much discouraged I gave it up myself, and when I got through I went away.

Q. What did they do?

A. I do not know. I left them there. I never had any communication or correspondence with them afterwards.

Q. Before you went away had you and Schofield and Thompson any talk with reference to the continuation of this work—
97 your work—upon the Poland and Hamilton mining claims or that mill, or otherwise?

A. That is something——

By Mr. MORRISON: That is leading.

By Mr. JOHNSTON: I do not know. I have not asked him what it was.

By Mr. MORRISON: This goes in under the same objection.

A. That is getting in pretty deep. We had, of course, like mining men, a good deal of talk about it. I remember distinctly we talked a good deal with Thompson with reference to it, after we had tested the ores—what we were going to do for ore to keep the mill running. We discussed that. I told him I was at a loss to know.

Q. What did he say?

A. I could not tell you anything he said, only in a general way.

Q. Tell us in a general way.

A. We were badly discouraged. We thought we would have to look around some place to get some ore to work the mill.

Q. Not from the Poland and Hamilton mining claims?

A. The impression we all had there—that is, the talk—that we could not make it pay.

Q. That is, you and Thompson and Schoefield?

A. When I say "us" I mean Thompson and Schoefield. I do not recollect distinctly any conversation at that time, but I recollect what the general feeling was—what the general talk was—
98 with us. I could not——

Q. Will you give the court the best recollection you have of the general talk between you three men with reference to that enterprise?

A. The general talk was and the conclusion we came to we could not make——

By Mr. MORRISON: Object to that on the ground he is asked to testify to a conclusion.

By the COURT: Yes, sir.

By Mr. JOHNSTON: A conversation which has transpired within ordinary limits, you might require almost an accurate repetition of it; but a conversation that is admittedly ten years in age, I think it fair that the witness may give his best recollection and general impression as to the conclusion and the results of the conversation, with

a preliminary statement that he cannot remember the exact words. I know what the rule is.

A. I could not state the talk, what was said in words, of course.

By Mr. JOHNSTON: I think it fair that the witness should be permitted to state the general character of the talk and the general conclusion of it, if he knows what the conclusion was, as between himself and his two co-associates. We get at the ultimate result in that way.

By the COURT: The object of this testimony is to show intent or purpose on the part of this plaintiff and his grantors of abandonment of the property.

99 By Mr. JOHNSTON: Yes, sir, and relinquish all claim to the Poland-Hamilton mining claims. That is the purpose of it.

By the COURT: Any conclusion that they might have reached as to the value of the property, it seems to me——

By Mr. JOHNSTON: That is immaterial.

By the COURT: It is too remote. If the witness can remember anything that was said or the effect, substance of anything that was said by either of these men as to their purpose in that respect, that would be admissible.

By Mr. JOHNSTON:

Q. I will try again. Will you kindly state to the court, not the words, but anything which you recall in the nature of conversation between yourself and Thompson and Schofield or either of you on the subject of this enterprise being a failure and your respective intentions with reference to it?

A. I do not think there was anything ever said with regard to our intentions about abandoning the property. I do not think we talked about that. I know this: we concluded not to work it.

Q. That is what I want to know.

A. As for abandoning the property——

Q. Why did you conclude not to work it—because it did not pay?

A. It did not pay.

Q. As a matter of fact, what did you personally do?

A. I went to California and left it; never heard a word from them afterwards.

100 Q. You left all your mining claims to take care of themselves?

A. Yes, sir; skipped the country.

Q. You had no intention of returning to the mining claims?

A. I got tired of them.

By Mr. MORRISON: It is immaterial what his intention was.

By the COURT: Yes, sir; his intention.

By Mr. JOHNSTON: Yes, sir; seriously immaterial.

A. I would not state now that Thompson and Schofield intended to abandon that property.

Q. I did not ask you that. I asked you about your own intention.

A. I could not state that.
Q. I ask you about your——
A. That was my intention. I did it.
Q. Do you know whether Thompson left the country?
A. I left him and Schofield there. I guess he left; I don't know when; I never had any more communication with them after that.

By the COURT: I want a little information about this to straighten me on the record. Do you claim, as part of your interest, now by conveyance from Mr. Collins made subsequent to this time?
By Mr. MORRISON: No, sir; I do not know what time he is talking about.
By the COURT: At the time he speaks of having left the property, in what condition was the title then?
By Mr. MORRISON: As far as I can judge from his statement——
101 By the COURT: No, sir; the record here——
By Mr. MORRISON: I do not know when he says he left.

A. I can tell you about the time I left. It kind of comes to me now we got the mill completed in the winter of 1885–'86. We had to haul it from Turkey creek. I left the property some time after we had made a run, May or June, 1886.
By Mr. JOHNSTON: There is a mistake about that.
A. Maybe. It comes to me just now. I hadn't thought of this thing.
By the COURT: Fix that date first.
By Mr. JOHNSTON: Yes, sir; I want to give the witness an opportunity to correct that.

Q. You spoke of 1885–'86. If it is true that suit was brought in 1886, you went out there and constructed—suit was brought by Roberts against you to foreclose that mortgage in 1886; you certainly had constructed that mill and operated it and equipped it before that suit was brought?
A. Yes, sir; no question about that.

By Mr. JOHNSTON: The record shows that suit was brought in 1886.
By Mr. MORRISON: Yes, sir.

By Mr. JOHNSTON:

Q. The mortgage, dated October 25th, 1883, this was the mortgage you gave to Roberts?
A. Yes.
Q. Did I not understand you to say it was later in that winter you got the mill up and commenced work?
102 A. We did not get it up that winter.
Q. State to the court, as nearly as you can, how long after the execution of that mortgage before you got the mill up there—went to work with it.
A. That would be 1883, 1884; 1884, 1885; that is my best recol-

lection. We got the mill up, probably, in the latter part of 1885 somewhere. I can't quite——

Q. Two years?

A. Yes, sir; we had to haul it from Turkey creek. It took us a long time to get that mill up.

By Mr. MORRISON: What is the date?

A. I know I left there in the spring of 1886. I did not stay a great while after the mill had failed. We ran the mill. We must have run the mill in the winter of 1885 and 1886.

By Mr. MORRISON: To answer the court's question: At the time he left, if it was in the spring of 1886, then the condition of the title was this, that the mortgage upon Collins' interest, suit had not been instituted to foreclose the mortgage, the mortgage having been given on the 25th of October, 1883; that subsequent to that time Collins acquired from one person an undivided one-fourth interest, from another person an undivided one-fourth interest, and before he left, subsequent to the mortgage——

By the COURT: I see now. I remember the record.

By Mr. MORRISON: He had conveyed those interests to Schofield and Thompson, respectively, one-fourth each.

103 By the COURT: You claim two conveyances had been made before this time?

By Mr. MORRISON: Yes, sir; certainly.

By Mr. JOHNSTON:

Q. Can you tell what time of the year you left the country?

A. My best impression — it was in the spring of 1886. I recollect suit was commenced against us in the fall of 1886.

Q. You remember that?

A. Yes; I recollect that because I came over to Phœnix about that time; that impresses it on my mind.

Q. I would like you to be as definite as you can about making this statement. Taking it for granted that you gave the mortgage on the 25th of October, 1883, state, as nearly as you can, how long thereafter it was before you constructed a mill upon the Poland and Hamilton mining claims—you, Thompson, and Schofield.

—. My impression still is that that mill was built in the winter of 1885.

Q. That is simply an impression?

A. It is my best impression.

Q. That is your best impression?

A. Yes, sir.

Q. Have you got any data?

A. I haven't got a thing in the world.

By Mr. MORRISON: This is rather cross-examination of his own witness.

104 By Mr. JOHNSTON: The man is mistaken. I am trying to give him an opportunity to explain his mistake. He is my

witness. I do not want to put him in any false attitude before the court if I can avoid it.

Q. How long did the mill run?
A. We must have run two or three months.
Q. Near two or three months?
A. Yes; we worked what ore was out. I think we took some out of the Poland tunnel. After that I recollect of two or three other mines—the Bullard mine. We worked considerable ore in there—a few hundred tons.
Q. In the same mill?
A. Yes.
Q. What became of the mill ultimately?
A. All I know is from reports.
Q. From your own knowledge?
A. You mean what people told me?
Q. No, sir.
A. I did not have any knowledge of it personally. I learned that they took it off and put it on the Lottie mine.
Q. I do not care what you learned, unless Thompson or Schofield told you.
A. No, sir; I had nothing from them. I never had any further communication about it; never had any more correspondence about it. I couldn't tell you. I supposed Schofield—I thought my
105 half interest was gone—"Let her go, Gallagher." I thought Schofield was there on the ground, and he would attend to it—his interest; thought he wouldn't neglect it.
Q. Tell the court why you thought those things.
A. Because he had his interest there if he wanted to protect it; that was the only reason. I was surprised he did not. I did not know what the reason was. It wasn't any question in our minds when we got through running that mill; we were all disgusted with it and thought the thing was a failure. There wasn't any question about that.
Q. That is what I have been trying to get at for three-quarters of an hour.
A. I tried to tell it.

Cross-examination by Mr. MORRISON:

Q. It was in the spring of 1886, in your best judgment, you left and went to California?
A. Yes, sir; that is my impression now.
Q. At that time you left Schofield and Thompson upon these properties?
A. Yes.
Q. And the mill was there at that time?
A. Yes, sir; but we had quit running it.
Q. You had quit running it?
A. Yes, sir.
Q. From that time on you did not know what Schofield or
106 Thompson's connection with the property was?

A. Well, I did not know anything from them.
Q. Personally?
A. No, sir.
Q. You never heard anything from them with reference to it?
A. No.
Q. For all you know, they might have stayed there for years afterwards, so far as you personally know?
A. Yes, sir; so far as I personally know.
Q. You say that you considered that your half interest in and to the Poland and Hamilton mining claims was gone, and that Schofield and Thompson were here to protect their own interests?
A. That was my mind on the subject.
Q. You mean the interest you had conveyed to them?
A. Yes, sir.
Q. An undivided one-fourth interest to Schofield and an undivided one-fourth interest to Thompson?
A. Yes, sir; that is what I have reference to.
Q. When you say you had lost your half interest it was because of the mortgage you had given John M. Roberts, that was foreclosed subsequently?
A. Yes, sir.
Q. Is that right?
A. Yes, sir.

107 Q. You say you never had any conversation with either Schofield or Thompson in which the question of your intentions with regard to the property—leaving the property—was discussed at all? All that you spoke about was the fact that you considered that it was not a paying proposition—something of that kind, wasn't it?
A. Yes, sir; that would be about what I want to say.
Q. That you got up and left, and that you left Schofield and Thompson there?
A. Yes, sir.
Q. How long they remained you do not know, and that the mill was there when you left?
A. Yes, sir.
Q. Is that right?
A. Yes, sir.
Q. How much work had been done? How much was that mill worth to you folks up there?
A. That mill cost twelve or fifteen thousand dollars—a ten-stamp mill.
Q. Who purchased it?
A. Well, Schofield furnished most of the money. I got an interest in the mill for a part interest in the mines.
Q. What work was done upon the Poland and Hamilton mining claims?
A. There was a tunnel in there. We worked out what was in the tunnel and took out——
Q. How much of a tunnel?

A. I do not recollect; quite a lot of ore there. I could not
108 recollect how many tons of it.
Q. Do you remember the length of the tunnel?
A. No, sir; I do not recollect that.
Q. Approximately?
A. No, sir.
Q. You do not remember that?
A. No.
Q. What other improvements were put up by Schofield and you and Thompson?
A. Mill was all.
Q. Beside the mill?
A. Nothing. An assay office.
Q. What was the assay office worth?
A. That building cost probably a hundred dollars. I paid for that myself. I recollect I paid for that myself.
Q. Anything else?
A. No, sir; I do not recollect of anything else now.
Q. Any development of the mines?
A. Yes, sir; I think there was some stoped out of the tunnel—stoped out some.
Q. What were the improvements, the development work of these mines, the Poland and Hamilton, at the time you and Schofield——
A. There was a tunnel in the Poland; a short, small shaft up on the Hamilton. We did not work any in this shaft. We just worked ore that was on the dump, what they took out of the tunnel, stoped out.
109 Q. Cannot you give us any idea of the length of that tunnel?
A. No, sir.
Q. Can you say whether it was fifty feet?
A. I would not state whether it was fifty feet or a hundred.
Q. It was over fifty?
A. Yes; I should judge it was over that.
Q. Was it a hundred?
A. I would not state that. There was quite a tunnel in there, quite a pile of ore.

By Mr. JOHNSTON:

Q. Did I understand you to say that you got an interest in this mill by virtue of giving to Thompson and Schofield an interest in the mine?
A. Partly; they paid part of it——
Q. You did not construct this mill, did you, until after you had conveyed those interests in the mines to Schofield and Thompson?
A. No, sir; afterwards.
Q. Afterwards?
A. Yes, sir.
Q. If your deed to Schofield was correctly dated November 14th, 1883, and your deed to Thompson correctly dated August 18th, 1884,

cannot you tell how long it was, with reference to the date of either of those deeds, before you and Thompson and Schofield constructed that mill?

A. Well, that would be 1884, 1885, wouldn't it; the winter
110 would be 1884–1885 after that deed?

Q. After which one of them?

A. After the Thompson deed. It was in 1884?

Q. Yes.

A. The mill was not up then. I am pretty sure now we put up that mill. Thompson came out; I was over in California; Thompson came out; they sent for me to come over; I fixed up a deed to them; to my best recollection, put that mill up in—we did our work on the ores in 1885–'86.

Q. You have given your best recollection?

A. 1885 and 1886.

JESSE ROBINSON, called and sworn on behalf of the defendants, testified as follows:

Direct examination by Mr. JOHNSTON:

Q. What is your name?

A. Jesse A. Robinson.

Q. Where do you live?

A. Out on Big Bug.

Q. What is your business?

A. Mining.

Q. How long have you been in this section?

A. Since about the 28th of March, twenty years ago—that is, that has been my home. I have been away from home.

Q. Did you know John M. Roberts in his lifetime?

111 A. Yes, sir.

Q. Are you familiar with the locality of the Poland-Hamilton mining claims which are involved in this lawsuit?

A. Yes, sir.

Q. Do you know of a mill for working the ores having been put on the Poland and Hamilton mining claims?

A. There was one put——

By Mr. MORRISON: We object to the evidence for the same reason we assigned to the other. Besides our objection to the testimony of Collins, I cannot see the relevancy of the question whether a mill was put on this property or not.

By Mr. JOHNSTON: I am going to show by this witness it was put on there and taken off. I am going to give the correct date from this witness as to when that was done.

By Mr. MORRISON: Even if that were so, if that were true according to statement of counsel, would that be any evidence whatever of the abandonment of a mine, because a mill was put on and taken off?

By the COURT: Perhaps not, except it might be a circumstance to be considered with other circumstances.

By Mr. JOHNSTON: That is it. I have to prove the various circumstances in the order in which they occurred.

By the COURT: While this in itself, an isolated fact like this, would have no significance, it might have in connection with other facts. I will admit the testimony, subject to objection, at present.

112 By Mr. MORRISON: A further objection to that, there is no time stated.

By Mr. JOHNSTON: That is what I am trying to prove now. I want to find when that mill was put there.

By the COURT: Answer the question.

A. There was a mill put at the creek to work ore out of that mine by Collins and these other parties.

Q. By the other parties you mean Thompson and Schofield?

By Mr. MORRISON: Leading; and object to the answer as not responsive, because he says a mill was put on some other property higher up the creek.

A. No, sir; it was not put on another property. It was put down on the creek, right under the property. I believe outside of the limits of the mine.

Q. Was that the only mill in that immediate locality at that time?

A. It was, sir.

Q. You stated it was put there by Collins and other parties; by "other parties" do you refer to Thompson and Schofield or——

By Mr. MORRISON: Leading.

By Mr. JOHNSTON:

Q. Whom do you refer to by other parties?

A. Schofield and Thompson.

Q. Can you locate about the time that that mill was put there by Collins, Schofield, and Thompson?

A. The best of my recollection is that it was put there——

113 By Mr. MORRISON: Object to the witness's best recollection. Let him state——

By Mr. JOHNSTON: That is the only possible thing he could give, his best recollection. You may cross-examine him as to why he has that recollection. Go ahead.

By the COURT: Yes, sir; if he knows that as a fact. He is only stating his best recollection.

A. It was put there, to the best of my recollection, in the fall and winter of 1884 and spring of 1885.

Q. You stated you knew a man named John M. Roberts?

A. I did.

Q. In his lifetime?

A. Yes.

Q. Do you know of his having any connection with or claim upon the Poland and Hamilton mining claims?

By Mr. MORRISON: I object. We have got the record evidence of the claims & title.

By Mr. JOHNSTON: I have to prove the entrance into absolute and exclusive possession on the part of John M. Roberts and the absolute disseisin of these alleged cotenants. I have got to prove one fact at a time—that he had some claim upon the property and that he did something—and I will try and show what he did.

By the COURT: Answer the question.

Pl'ff exc'pt'd.

A. He had claims on it.

Q. Referring to about 1887–1888, do you know whether or
114 not J. M. Roberts did anything in connection with the Poland-Hamilton mining claims?

A. He went there and worked on them himself and hired men to work there. He went there and worked himself.

Q. Whom did he hire to work upon the Poland-Hamilton mining claims in 1888, if you know?

A. Levi English and myself.

Q. What were you working for?

A. Working for wages, doing assessment-work for old man Roberts.

Q. Were you doing assessment-work?

A. Yes, sir.

Q. State how many assessment-works you and this man did in 1888 for old man Roberts.

A. We did one for the Poland and one for the Hamilton.

Q. In 1889 what did old man Roberts do with reference to either of those mining claims?

A. He had work done on them.

Q. Whom did he employ?

A. He worked himself, and he hired J. F. Foster, Levi English, and myself.

Q. What did you and the balance of your associate hired men do?

A. We did assessment-work.

Q. How many did you do?

A. We did two.

115 Q. How many for each?

A. One for each.

Q. What value of each?

A. One hundred dollars or more.

Q. When did J. M. Roberts, within your knowledge, commence to assert this claim to the Poland and Hamilton mining claims—before 1888?

A. I believe I do not know whether he did or not, for certain, that he commenced before that, but I believe he did.

Q. In 1888?

A. Yes, sir.

Q. You believe he asserted his claim before that?

A. Yes, sir.

Q. What became of this mill which you say you think was put in there in the fall of 1884?

A. It was torn down and moved down to the Lottie mine.

Q. Who tore it down and moved it away?

A. Mr. Schofield, as I understood it then.

By Mr. MORRISON: Object to it, then; he says as he understood it.

By Mr. JOHNSTON: That is the only possible way in which a man can testify——

By the COURT: That answer is very—as he understood it—unless he knows some facts. Let him state what the facts were.

Q. Do you know whether that mill was removed from those premises?

116 A. I do.

Q. Can you give us about the year?

A. It was not later than the first of 1886.

Q. First of 1886?

A. Some time about that time.

Q. It was before you commenced to do assessment-work?

A. That is, the machinery of the mill was taken out and taken away before that time.

Q. Was the machinery of the mill taken out and taken away before Mr. Roberts commenced to assert claim to the two mining claims or after?

A. I think before.

By Mr. MORRISON: Object because he says "I think."

A. To the best of my knowledge.

By the COURT: Of course, you can cross-examine him as to that. The court will not consider his testimony unless it is proven.

By Mr. JOHNSTON: He cannot state it absolutely.

Q. Whom did you see remove that machinery from those premises?

A. Schofield himself, I believe, done the hauling, as well as I recollect. He hauled the machinery away from there, and he was there at the time it was torn down.

Q. Where did he put it, if you know?

A. He put it down at the Lottie mine.

Q. Where was Thompson at that time?

A. I do not know.

117 Q. Was he in the country?

A. I do not think so.

Q. Who else, if any one, when old man Roberts asserted his claim to the Poland-Hamilton mining claims, within your knowledge, asserted any claim to it?

A. Never heard of any man.

Q. What did old man Roberts do with reference to his claim upon the Poland-Hamilton mining claims?

A. He went there and worked and hired other men to work, just the same as he would on any other claim, I believe.

Q. Do you know of his having done any assessment-work upon claims himself?

A. Yes, sir.

Q. Later on—say in 1890?

A. In 1890 he worked there himself.

Q. Doing what?

A. Doing assessment-work.

Q. Can you state whether or not he did assessment-work?

A. He did.

Q. About how much work did he do upon each of the claims, as to value?

A. He said he had one hundred dollars' worth of work done, and quit them and went back down home.

Q. Do you know whether or not himself——

A. I know he done a great deal of work there for some
118 length of time. I don't know——

Q. You personally know he worked there?

A. Yes, sir; I do.

Q. How are you able to fix that date of 1888 being the first year you did assessment-work; from any circumstances?

A. In that year—I think that was the first year I did any assessment-work; is the best I recollect; was the year that Buckey O'Neill ran for sheriff.

Q. In that way you are able to fix that year, 1888?

A. Yes, sir.

Q. Take the witness.

Cross-examination by Mr. MORRISON:

Q. As I understand you, it is this way: Some time in the year 1888 J. M. Roberts went upon the Poland and Hamilton mining claims, either by himself or by those whom he hired, and did assessment-work upon the property. Is that right?

A. Yes, sir.

Q. Do you know that in 1889 that, either by himself or by those whom he employed, he did assessment-work; that he did an assessment upon the Poland and one upon the Hamilton mining claim; is that correct?

A. Yes, sir.

Q. And that in 1890 John M. Roberts did an assessment-work upon the Poland and one upon the Hamilton; is that correct?

A. Yes, sir.

119 Q. You say that in 1886, you think, a man named Schofield took down the machinery that was in a mill building on the Poland and Hamilton mining claims, or right close to the Poland and Hamilton mining claims, and moved it away to some other mine. Is that right?

A. He took it away, either in 1886 or before that time; it was not later.

Q. Either in 1886 or before that time?

A. Yes, sir.

Q. Have you any way of fixing that date? You fixed the date of 1888 of Bucky O'Neill being a candidate for sheriff. Can you fix this date in any way?

A. I cannot fix the date when he started in to take it down; no, sir.

Q. I mean about the year; so far as the year is concerned, what year was it? Was it the early part of the year 1886 or the latter part of 1885?

A. I think about the first of 1886, the best of my recollection.

Q. About the first of 1886?

A. Yes, to the best of my recollection; some time along there; the latter part of 1885 or early in 1886.

Q. The latter part of 1885 or early in 1886; is that right?

A. Yes, sir.

Q. Did I understand you to say that the mill you have been talking about was not on or within the boundaries of either the Poland or Hamilton mining claims?

120 A. I do not think it was on the ground claimed by the mining claims. I think it was just outside, on the creek, right under the mine, under the Poland ground—adjoining the Poland.

Q. You have lived out there since 1877?

A. Yes, sir.

Q. That is all.

By Mr. JOHNSON:

Q. That mill was the only one adjoining those claims?

A. There was no mill, no quartz mill, anywhere at that time closer than the Howell smelter.

Q. That was the only mill there which Collins, Schofield, and Thompson constructed?

A. Yes, sir.

By Mr. MORRISON: I do not think he ever said who constructed it.

By Mr. JOHNSTON: Yes, sir; he did; he stated it.

Q. If it is true that Mr. Roberts got a deed from the sheriff to that property in September, 1887, about how long after that was it before Roberts commenced to assert his claim to the Poland and Hamilton mining claims?

A. When we were working there, doing the asessment-work, on Thanksgiving day—that was some time the latter part of November. We were there I know on that day.

Q. That was in 1888?

A. Yes.

Q. If it is true that Roberts had a deed from the sheriff

121 dated September, 1887, how long after that was it before Roberts commenced to assert claim to the Poland and Hamilton mining claims, if you know?

A. I do not know.

Q. You don't know that?

A. No, sir.

Q. That is all.

J. F. FOSTER, called and sworn on behalf of the defendants, testified as follows:

By Mr. JOHNSTON:

Q. Your name is J. F. Foster?
A. Yes.
Q. You live in Yavapai county?
A. Yes.
Q. Are you familiar with the Poland and Hamilton mining claims involved in this suit?
A. Yes, sir; I live close to it.
Q. Did you know a man named J. M. Roberts?
A. Yes, sir.
Q. Did you ever have any transaction with him with reference to the Poland-Hamilton mining claims?
A. Yes.

By Mr. JOHNSTON: Mr. Robinson states he has been misled, and has made an incorrect statement about that date, which he desires to correct.

122 JESSE A ROBINSON, recalled, testified as follows:

By Mr. JOHNSTON:

Q. If you in your previous testimony for any reason have been misled as to a date, you now have an opportunity to correct yourself.
A. I am just one year off on the date.

Q. State to the court wherein you are one year off.
A. Old man Roberts died in 1889. I said that he did assessment-work in 1890. He did it the year he died. He died in 1889. On the two years before that he done the assessment-work, just as I stated, only one year earlier than I stated.
Q. What you meant to convey was that you and Foster and other people whom you mentioned did assessment-work. Instead of 1888–'89 it should have been 1887'–88?
A. Yes, sir; that is correct.
Q. And that Roberts did it himself the year of his death, to wit, 1889?
A. Yes, sir.
Q. That is all.

FOSTER—Examination continued.

By Mr. JOHNSTON:

Q. Did you state that you had any business transaction with J. M. Roberts, deceased, in connection with the Poland and Hamilton mining claims?
A. Yes.
Q. Do you know where the Poland-Hamilton mining claims are?
A. Yes, sir; half a mile of our house.

123 Q. What years did you have that transaction with Mr. Roberts with reference to those claims?

A. My recollection is, in 1887.

Q. What was the character of the transaction, so far as you were concerned?

A. Roberts came over there when he had assessment-work done. Robinson and English were doing the assessment-work. He got me to sort a sack of ore that was on the dump.

Q. That was 1887?

A. Yes; that was in 1887.

Q. Are you able to state who did or caused to be done the assessment-work on the Poland and Hamilton mining claims in 1887?

A. Robinson and English and Roberts did the work in the mine.

Q. J. M. Roberts?

A. Yes.

Q. Before that time, had you seen or, rather, was there upon the Poland and Hamilton mining claims any mill for working ore?

A. Yes; there was a mill put up there on Big Bug creek.

Q. Do you know whether or not Collins, Thompson, and Schofield or who put it up there?

A. Only by hearsay.

Q. Do you know who, if anybody, removed the mill?

A. That I could not say; I don't know. I was not on the creek or sick at that time. I know it was moved, but who done it—just what time—I don't know.

124 Q. Do you know it was moved?

A. Yes, sir; I know it was moved.

Q. Was it moved before or after you did that in 1887 for J. M. Roberts?

A. My recollection was that the machinery was all moved away from the mill at that time.

Q. That is, before?

A. Yes, sir; there was none there when we done that work.

Q. You do not know anything about where it was carried?

A. Only by hearsay.

Q. Not personally?

A. Not personally, I do not.

Q. State whether or not from these facts you have *soplen* of full assessment to the value of at least one hundred dollars upon the Poland and Hamilton mining claims each was done or caused to be done by Roberts?

A. That I could not say, because I was not at work doing the assessment-work.

Q. Cannot you give the court some notion of the approximate value of the work that was done?

A. Yes. I know that Roberts—we lived together—for the length of time he worked there he done two hundred dollars' worth of work that year.

Q. That is the year 1887?

A. Yes; 1887.

125 Q. Upon the two claims?

A. Upon them two claims.
Q. Do you know who was claiming the Poland-Hamilton claims in 1887?
A. Roberts.
Q. J. M. Roberts?
A. Yes, sir.
Q. Do you know of anybody else claiming them?
A. No, sir.

By Mr. MORRISON: Object to the question; asking the witness to testify to a conclusion.
By the COURT: Yes; a question as to claim is a very large question. I do not think he is competent to testify as to that.

By Mr. JOHNSTON:

Q. Who, if any one else than J. M. Roberts, was working upon or causing any work to be done upon the Poland-Hamilton claims?
A. Yes, sir; in 1887?
Q. Yes, sir.
A. He had Robinson and English.
Q. Anybody else other than Roberts? You all were working for Roberts?
A. Yes, sir.
Q. Was any one else than Roberts causing any work or anything else to be done on those mines?
A. There was not.

126 Cross-examination by Mr. MORRISON:

Q. The fact is that in 1887 a man named J. M. Roberts did the assessment-work or caused it to be done upon the Poland-Hamilton mine; is that right?
A. Yes, sir.
Q. Now, of your own knowledge, you cannot state for whom that assessment-work was being done?
A. Yes; for Roberts told me it was for him.
Q. I do not want to know what Roberts said. I ask you of your own knowledge.
A. I did not know there was any other way I could give it.
Q. I am asking you what you know yourself, not what other people told you.
A. Well, all I knew of the case, it was him.
Q. All you knew was that Roberts was causing the work to be done upon those claims?
A. Yes, sir.
Q. Is that right?
A. Yes, sir; for himself.
Q. Did you do work that year, assessment-work?
A. I do not know whether he was having that in for assessment-work or not.
Q. What time of the year was it you were working?

A. I think it was in September.

Q. September, 1887?

127 A. Yes.

Q. In 1888 did you do any of the assessment-work?

A. I did not.

Q. You did not?

A. No, sir.

Q. All you know is that Roberts was working on the claims?

A. Yes, sir.

Q. Is that right?

A. Yes.

Q. In 1889 did you do any assessment-work?

A. I did not.

Q. You say that John M. Roberts was living in the same cabin with you?

A. Yes, sir.

Q. How far away from the claims?

A. About half a mile from the claims to our house.

Q. What work was done in 1889 upon those claims?

A. Roberts boarded with us. He was there six weeks to two months, doing work himself.

Q. In 1890 do you know what was done?

A. No, sir.

Q. You do not know anything about 1890?

A. No, sir.

Q. 1891?

A. I came here to town in fall of 1890. I don't know who worked.

128 Q. Before you came to town?

A. Well, I do not know who worked.

Q. There was work done?

A. I was on the sick list. I do not know who did work.

Q. There was work done?

A. That I could not say.

Q. How far from the claims were you living?

By the COURT: He says he came to town in 1890.

By Mr. MORRISON: He said before he came to town. He said he came in the fall of 1890. Before you came to town, in the fall of 1890, where were you living?

A. I was living out there.

Q. Same place you were in 1887?

A. Yes, sir.

Q. You say you were on the sick list?

A. Yes, sir.

Q. You do not know whether or not there was any work done on the claims during that year, up to the time you left?

A. I do not remember who done the work, or whether there was any work done.

Q. That is all.

By Mr. JOHNSTON:

Q. Do you know who paid you for the work you did there at the request of J. M. Roberts?

A. J. M. Roberts did.

129 J. R. LOWRY, called and sworn on behalf of the defendants, testified as follows:

Direct examination by Mr. JOHNSTON:

Q. What is your name?

A. James R. Lowry.

Q. Did you know James M. Roberts, whom we have been speaking of here, in his lifetime?

A. Yes, sir.

Q. Where is he now?

A. He is dead.

Q. Do you remember the year of his death?

A. Yes, sir; I think I can tell you. He died in 1889; some time in September, 1899.

Q. Prior to his death did you have any business relations with him?

A. Yes.

Q. What were the character of those business relations?

A. Well, I was hired by Roberts to work on his ranch and on his mines, and I worked for him for seven years.

Q. After the death of Mr. Roberts had you any relation to his estate?

A. Yes, sir; I was appointed administrator for his estate.

Q. Did you know much or little of Mr. Roberts' business affairs during his lifetime?

A. I believe I knew just as much about his business as any-
130 body, outside of himself during his lifetime, and his partner, Wells. In fact, I believe I knew more, being employed by him; was with him, associated with him in work on the ranch and different places. I heard their conversations and knew as much, I suppose more, about their business than anybody outside of the two themselves.

Q. Do you know anything of Mr. Roberts having foreclosed a mortgage upon the Poland and Hamilton mining claims?

A. Yes, sir.

Q. Do you know whether or not he got a deed from the sheriff?

A. I knew the facts in this way——

By Mr. MORRISON: We object.

By Mr. JOHNSTON: I do not care how you knew it, if you know it. You stated you did.

By Mr. MORRISON: Object to anything with reference to the sheriff's deed. That is in evidence itself.

By Mr. JOHNSTON:

Q. If the sheriff of the county made a deed to the Poland-

Hamilton mining claims in September, 1887, to Mr. Roberts, will you state whether or not Mr. Roberts did anything in connection with the Poland and Hamilton mining claims after that deed?

A. Well, now, to make myself understood, if you will allow me, I will state it just as I understand it—just as I know about it.

Q. Go ahead.

By Mr. MORRISON: Object to that form.

131 By the COURT: Yes, sir; anything with reference to the foreclosure is improper.

By Mr. JOHNSTON:

Q. After the giving a deed by the sheriff to Roberts of the Poland and Hamilton mining claims, in September, 1887, are you able to state whether Roberts did or caused to be done anything in connection with those mining claims?

A. He did.

Q. Kindly tell the court all he did.

A. Mr. Roberts left his home——

By Mr. MORRISON: The same objection is made to the balance of this testimony.

By the COURT: Yes, sir; it goes in subject to objection.

Q. Go ahead.

A. He left his home to go to the Poland mine to do some work, assessment-work. He spoke of going there, and had his partner, Wells, to take him there. I did not see him on the claims while he was doing the work, but he went up and came back. He said he had done the work at other times.

By Mr. MORRISON: We object to the conversation between him and Roberts.

By the COURT: Yes, sir; perhaps what he said is immaterial. If he knows what he did, he may state that.

Q. Do you know of Mr. Roberts either having done, or caused to be done, any assessment-work upon the Poland-Hamilton mining claims before he died?

132 A. Yes, sir. I know it just as well as a man can know it not to see him do it.

Q. Please tell the court what he did, leaving out what he said.

A. In the first place, Mr. Roberts—one or two years he hired men and sent them there to do the work. The year that he died, 1889, he went up and did the work himself and came back.

Q. Do you know what assessment-work or whom he employed to do it on the Poland and Hamilton mine in 1888?

A. Well, the men whom I knew connected with the assessment-work in regard to the two mining claims were Robinson, Foster, and English. Just exactly whether it was in 1888 or 1889—in fact, they were there two or three years, employed by Mr. Roberts.

Q. That was after he received the deed from the sheriff and, of course, before he died?

A. Yes, sir; as I understand it.

Q. Don't you know it?

A. Yes, sir. I believe I know it. I will tell you I do not mean to say I saw him doing this work. Those men told me he did the work.

Q. I did not ask you that at all?

A. Well——

Q. Can you state any act which Roberts did soon after the obtaining this deed to these mining claims from the sheriff in connection with these mining claims? Did he go upon them or do any other act in connection with them? If so, state it.

133 A. Yes, sir; he went there different times.

By Mr. MORRISON: Object to that question—leading.

By Mr. JOHNSTON: I do not think it is leading.

By the COURT: Perhaps not objectionably so. State what you know about it.

A. Well, I know that Mr. Roberts went to the mining property, said it was his property, and used it and managed it.

By Mr. MORRISON: Object to what he said.

By Mr. JOHNSTON:

Q. You can tell what he did.

A. He worked there, hired men to work there, and spoke of the Poland-Hamilton mining claims as being his.

By Mr. MORRISON: I object to that portion. Of course, your honor will discriminate. I want to keep the record straight.

By Mr. JOHNSTON: Let the court eliminate it, and let the witness give his answer.

By the COURT: State what he did.

Q. Did he go upon the mining claims soon after the deed was executed to him?

A. Certainly; there is no question of doubt in my mind about that.

Q. How often? Can you tell?

A. Perhaps once a year—twice a year—over the mining claims at different times. He used to make it a point coming to Prescott to come by his mining claims to see the men whom he had employed there; furnish provisions that I had settled the bill for after-

134 wards at Joe Mayer's for supplies and other things that went in his wagon to those mining claims.

Q. For the men who were working there?

A. I understood so.

Q. You paid the bills for him?

A. Part of them I did; not all, but part.

Q. With reference to his first connection with those mining claims, can you say whether at that time there was a mill upon either of them?

A. Well, in regard to the mill—what was done—I could not state any facts about that more than hearsay.

Q. Very well. Do not state anything. Do you know of any one else, at the time that Mr. Roberts first commenced to perform those acts in connection with the Poland and Hamilton mining claims, asserting any claim to either the Poland or the Hamilton mining claim?

A. Never did.

By Mr. MORRISON: Object to that.

By Mr. JOHNSTON: Whether he knows of any one, after Roberts commenced to control the mining claims, assert- any claim to either of the mines.

By Mr. MORRISON: That is highly objectionable.

The objection is, in the first place, he would be testifying to what others have told him; to assertions made by some other person or not, as the case may be. Is it material at all as to whether
135 any one else asserted any claim to it or not, according to his knowledge of it. He was not on the claim; he was not there nor in charge of the claim, nor anything. In other words, you go out into the realm of strictly hearsay evidence, if the rule was permitted to be stretched to that extent.

By Mr. JOHNSTON: On the contrary, my notion is the best way to assert claim to a mining claim is to go upon it and to do some physical act in connection with it; not to stand on the mountain and say, "This is my claim," but to go on the mining claim and do some act which indicates a claim upon it—that you are controlling it, in possession of it.

Remarks.

By the COURT: As far as that testimony is concerned, I presume you are seeking to show adverse possession of the mining claims on the part of Roberts?

By Mr. JOHNSTON: Yes, sir; certainly.

By the COURT: I do not know that anybody else asserting claim to that mining claim at the time that Roberts was asserting ownership could defeat the plea of the statute. It seems to me to be immaterial. If you seek to show abandonment on the part of Schofield and Thompson, the fact as to whether they did anything in connection with the mining claims might be——

By Mr. JOHNSTON: That is what I am getting at.

By the COURT: Not upon the issue of adverse possession.

By Mr. JOHNSTON: I want to see if I cannot prove by—by this witness, from the time that J. M. Roberts obtained his deed
136 to these two mining claims, that he exclusively took charge of, controlled, managed, and did the assessment-work upon both of them; if I can show that, if this witness knows it——

By the COURT: If he knows the facts, and can say whether any one else did anything in connection with the mining claims during those years, he can answer that.

By Mr. MORRISON: Exception.

By Mr. JOHNSTON:

Q. Do you know whether or not any one, except J. M. Roberts, after he obtained a deed from the sheriff to the Poland and Hamilton mining claims—whether anybody else, except him or those employed by him, did anything in connection with the Poland and Hamilton mining claims?

A. If anybody ever die I have no knowledge of it.

Q. What opportunities did you have of seeing those mining claims during those years?

A. I passed over the mining claims different times.

Q. Did you have good, bad, or indifferent opportunities to see?

A. I had good, so far as that is concerned. I did not go on the mines to examine them. I passed over them. I stopped at the camp of Robinson and Foster at different times I passed there and all over, and knew what was going on about the claims as well as a man could know not to see men there personally at work by my own observation.

Cross-examination by Mr. MORRISON:

Q. Did I understand you to say you ever saw any one
137 working on these claims yourself—you ever saw any one working there at all in 1887, 1888, 1889?

A. In the mine?

Q. Not only the mine; on the property.

A. No, sir. I met men going to and from the mine, doing their work, as they told me—just as when a man can know those things not to see it.

Q. I do not want to know what people told you, but what you know yourself. For all you know personally, there might have been a dozen men working on the mines there when you passed over them at some particular time.

A. It might have been possible, but I hardly think it probable.

Q. You would not swear there wasn't men working in some of the——

A. Knowing Roberts as I did, I would come nearer taking his word for what he would say than I would take my own. I am speaking not what I have seen, but as one man can get to know those things from a statement.

Q. The fact of the matter is, all you know about this work is from what Roberts told you, isn't it, largely?

A. Yes, sir; Roberts and others.

Q. Mr. Roberts and others?

A. Yes.

Q. Of your own personal knowledge, from seeing what was done by others on those claims, you can't say there was any work done?

A. I did not see anybody at work in the mine; no, sir.

138 Q. When did you become administrator of the estate?

A. It was in 1889, I believe; some time during the month of October, 1889.

Q. Do you know the work done on the claims in 1889?

A. No, sir. Roberts had done the work and came home.
Q. In 1890?
A. In 1889.
Q. In 1890?
A. No, sir; in 1890. That part of it—I could not explain it satisfactorily to the court, perhaps. I will leave it off. The work was done all right.

By Mr. JOHNSTON: Why can't you explain it to the court?
By Mr. MORRISON: Let him——
By Mr. JOHNSTON: He said he couldn't. I think it has created a false impression. Why can't you explain to the court how much work was done in 1890, if it was done?
By Mr. MORRISON: I object to that. He can make the explanation if he wants to.
By the Court: I presume he meant to say his testimony would be incompetent.

A. Yes, sir.

By Mr. MORRISON:

Q. Was the assessment-work done on the Poland and Hamilton mining claims in 1890, when you were administrator?
A. I was satisfied it was.
Q. How about 1891?
139 A. 1891 the property was sold. I had nothing further to do with it.
Q. That is all.

By Mr. JOHNSTON:

Q. The property was under bond from you as administrator in 1890 to Frank Murphy and a man named Marks?
A. That is my impression.
Q. Your impression is that they did the assessment-work?
A. Yes, sir; Marks.
Q. Marks did?
A. Yes, sir. He had a bond.
Q. Somebody did the assessment-work on those mining claims in 1890, didn't they?
A. Yes, sir; I am perfectly satisfied they did. The reason why I——
Q. That is all. I do not want any more.
A. I want to make my statement clear, so that Mr. Morrison——
Q. I say that is all.

By Mr. MORRISON: If you have any explanation to make, go ahead and make it. I would like to have you to make it.

Dr. G. W. VICKERS, recalled on behalf of the defendants, testified as follows:

Direct examination by Mr. JOHNSTON:

Q. You have been sworn and stated what your name was?

A. Yes.

140 Q. You have stated that you knew E. M. Dickey?

A. Yes.

Q. Whom we have mentioned here as having a patent to the Poland and Hamilton mining claims?

A. Yes, sir.

Q. Do you remember the fact as to whether or not E. M. Dickey ever received any deed of conveyance to the Poland-Hamilton mining claims from the administrator of the estate of John M. Roberts?

By Mr. MORRISON: We object. The deed is in and speaks for itself.

By the COURT: Yes.

By Mr. JOHNSTON: I want to get the date. I am asking him if he remembers the fact that this man got a deed. Now, it is competent for me to show——

By the COURT: You may fix the date.

Q. You remember that fact? Will you kindly state about the date of it.

A. The date—I believe it was dated July 20th, 1891.

Q. Do you know of the Poland and Hamilton mining claims?

A. Yes, sir; I do.

Q. Their locality?

A. Yes, sir.

Q. You are somewhat familiar with them and with their condition?

141 A. Yes; I am familiar with them.

Q. Commencing, say, July 20th, 1891, will you state what, if anything, E. M. Dickey did or caused to be done in connection with the Poland and Hamilton mining claims?

A. Some work was done during that year by George Marks for Mr. Dickey, and perhaps some for patenting at the same time.

Q. Work done upon what?

A. Upon the Poland and Hamilton mines—both.

By Mr. MORRISON: Object; incompetent and irrelevant and not tending to prove any issue in the case.

By Mr. JOHNSTON: I am seeking to prove that Mr. Dickey went into open and notorious possession of the property and commenced to control and manage it. I do not know how else to prove it.

By the COURT: Yes, sir; it will be admitted, subject to objection.

By Mr. JOHNSTON:

Q. State anything else that Mr. Dickey caused to be done in connection with the Poland and Hamilton mining claims after you say he received a deed.

By Mr. MORRISON: Same objection.

A. During 1891——
Q. I do not confine you to 1891; subsequent to July 20th, 1891.
A. During that year there was considerable work done.
Q. Who caused it to be done?
A. Mr. Dickey.
Q. Was it done in the night-time or daytime?
A. It was done during the daytime.
142 Q. Kindly indicate the character of the work.
A. Partly done by running a tunnel, completing a shaft.
Q. Was it done publicly or secretly?
A. It was publicly done.
Q. Will you please continue and state anything else that Dickey caused to be done?
A. During 1892 the proceedings for patent were completed.
Q. Patent for whom?
A. Patent for Mr. Dickey.

By Mr. MORRISON: Object to that; the patent speaks for itself.
By the COURT: Yes; the patent speaks for itself.
By Mr. JOHNSTON: Does not Mr. Dickey have to do an act to start the land office into operation?
By the COURT: You put all those things in evidence. That shows on its face. There is no use to put in oral evidence here upon facts which appear——
By Mr. MORRISON: There is no objection to any of the papers in reference to the application for patent.
By Mr. JOHNSTON: When we come to the question of one cotenant ousting another cotenant, we find there are a great many things which the cotenant has to do in order to oust his cotenant. He not only has to enter into adverse, open, notorious possession, exclusive in its character, but he must enter it with hostile intent toward all the world; and the only possible way in which we can show he did those things, he not being here, is to show
143 what he did. These acts become tantamount to entering into exclusive possession, and we infer the intent from his conduct. That is what I conceive the authorities are.
By the COURT: You infer his intent from his conduct, but the best proof of his conduct appears in those papers.
By Mr. JOHNSTON: Very well.

Q. Who paid the taxes on the Poland-Hamilton mining claims from the date that Mr. Dickey, on July 20, 1891, received this deed?

By Mr. MORRISON: Same objection.

A. Mr. Dickey.

By the COURT: Same ruling. Admitted subject to objection.

By Mr. JOHNSTON:

Q. What, if you know, improvements or development work did

Mr. Dickey after that date cause to be done upon either of those claims?

By Mr. MORRISON: Same objection.

A. Up until the time he severed his connection, I should judge there would be about eight thousand dollars' worth of work done on the claims.

Q. At the expense of Mr. Dickey?

A. Yes, sir; at the expense of Mr. Dickey and F. M. Murphy; part of the time they were in partnership together.

Q. Since that time, 1891, and up until the institution of this suit, what, if any, improvements or development work has been — upon the Poland and Hamilton mining claims?

By Mr. MORRISON: Same objection.

144 Q. As to value; I do not want you to go into details.

A. The expense account against those claims up until the present date amounts to between thirty-five and forty thousand dollars.

By Mr. MORRISON: He is saying the expense account shows——

A. That is the account against those claims for labor.

By Mr. JOHNSTON: He is trying to say that these people have expended thirty-five or forty thousand dollars on these mining claims.

By Mr. MORRISON: My objection is that the witness stated the expense account showed so much. He is testifying to the contents of a written document. That is what the witness said. I object to it on that ground. It is incompetent and improper.

By Mr. JOHNSTON: That is a mere matter of phraseology.

By the COURT: You may answer the question.

A. There has been between thirty-five and forty thousand dollars which has been spent on the claims from the time they took possession up until the present.

Q. By whom?

A. Dickey and Murphy, Ferry, Bowen, and Simon J. Murphy.

Q. Defendants in this action?

A. Yes, sir.

Q. Has it been done openly and notoriously or secretly?

A. Openly and notoriously; everybody knows it.

Q. Give the court, will you please, some notion of the character of those improvements.

145 A. By running tunnels, sinking winzes. On the Poland-Hamilton mine, I think the tunnel in there was between 250 and 300 feet. The tunnel now is in 2,360 feet.

Q. Has that been done since Dickey received this deed?

A. Yes.

Q. By him and these grantees of his?

A. Yes, sir. Another tunnel on the Hamilton has been run 230 feet and a winze sunk 100 feet deep from that.

Q. Since July, 1891, any one else other than Dickey and these grantees of his have done any work or made any improvements upon either the Poland or Hamilton mining claims?

By Mr. MORRISON: Object; irrelevant and incompetent and immaterial.

By the COURT: He has not shown his competency to answer that question.

—. Have you any knowledge, as a result of your relations with Mr. Dickey or these grantees, F. M. Murphy, Ferry, and Bowen—all of these defendants—of the management and control of the Poland and Hamilton mining claims since 1890? Have you had anything to do with them yourself?

A. Yes, sir. I have been intimately connected with them during that time—from that time.

By Mr. MORRISON: Object to the question and answer as immaterial, incompetent, and irrelevant.

By the COURT: This is proving his competency.

146 By Mr. JOHNSTON:

Q. Have you had any familiarity with the Poland and Hamilton mines during these five or six years?

A. Yes, sir.

By Mr. MORRISON: Object to the question and answer on the same ground—irrelevant, incompetent, and immaterial.

By the COURT: The court will not rule out questions put for the purpose of establishing his competency—his knowledge of the subject-matter.

By Mr. JOHNSTON: I am doing what the court directed me——

Q. Have you had frequent or infrequent opportunities to see what was going on at the Poland-Hamilton claims during these years?

A. I have had almost the entire management of these claims since the time they were bought.

Q. That is what I was trying to get you to say. Will you, as a result of their entire management, state to the court in a general way the character of the improvements which have been made upon the Poland and Hamilton mining claims by Mr. Dickey and his grantees—Murphy, Bowen, and Ferry and Gage, and the balance of them?

By the COURT: I think he has stated that.

Q. Then, as a result of your exclusive management of the Poland-Hamilton mining claims since 1891, are you able to state whether anybody else other than Mr. Dickey and his grantees ever has done any work or made any improvements upon either of those mines?

A. They have not.

By Mr. MORRISON: Incompetent, irrelevant, and immaterial, and we object on that ground.

147 By the COURT: The evidence will be admitted subject to objection.

Q. What was the answer?

A. I can say that they have not. I am positive, for I would have knowledge of it if they had, always having men at work on the claims.

Q. During all those years?

A. During all those years.

Q. Those are your opportunities for observing what is going upon those mining claims?

A. Yes, sir; my frequent visits out there.

Q. Have you frequently been there yourself?

A. I have.

Q. Are you able to state, if you know, what work has been done; who have caused it to be done?

A. Yes, sir; I can.

Q. Then is the work which has been done during these years the result of your control and management or that of somebody else?

By Mr. MORRISON: We object: incompetent, irrelevant, and immaterial.

By the COURT: It may be admitted under the same ruling.

By Mr. MORRISON: It asks to testify, not the facts, but the conclusions.

Q. What is your answer?

A. The result of my management under the direction of Mr. Murphy.

148 Q. F. M. Murphy, one of the grantees of E. M. Dickey?

A. Yes, sir.

Q. Can you say when it was that you first learned of this claim adverse to Mr. Dickey as to this property?

By Mr. MORRISON: We object—incompetent, irrelevant, and immaterial.

By the COURT: I am inclined to think that objection is good on the ground of materiality.

By Mr. JOHNSTON: I presume that the filing of the complaint is the first notification that we got, unless they trace to us some other claim that they made before. I do not know of any other. Take the witness.

Cross-examination by Mr. MORRISON:

Q. When did you first become connected with the Poland-Hamilton mining claims?

A. From the time of its purchase by Mr. Dickey.

Q. That was in 1891?

A. Yes; 1891.

Q. Since that time you have acted for Dickey and his grantees, as the other parties have come into possession of title of the property?

A. Yes, sir.

Q. You know that this work has been done upon the Poland-Hamilton mining claims?

A. Yes, sir.

149 Q. The work you have described. That is all.

M. E. COLLINS, recalled on behalf of the defendants, testified as follows:

By Mr. JOHNSTON:

Q. Since you testified in this case, has anything occurred by which you are able to refresh your recollection with reference to this mill, which you have previously said that you, Schofield, and Thompson constructed upon or at or near the Poland-Hamilton mining claims?

A. Yes, sir; I was thinking back what I had been doing during those years. I recollect now of taking an excursion over from Los Angeles to Phœnix in December, 1885, and the canal went out in January, so it must have been the year before.

Q. January, 1885?

A. 1886.

Q. Now, then, it must have been with reference to this mill you are going to say?

A. It was the year before.

Q. That is 1884?

A. 1884, 1885.

Q. You and Thompson and Schofield constructed the mill at or near or upon the Poland and Hamilton, and ran it during that spring; that is your statement now?

A. Yes, sir; I recollect that point. I recollect the years distinctly. I recollect taking that excursion over there and the

150 dam going out.

By Mr. MORRISON:

Q. It was in the spring of 1885 you left there?

A. Yes, sir.

Q. That is all.

Evidence closed.

Case taken under advisement by the court.

151 *Index.*

	Page
Offers of plaintiff:	
Location notice, Hamilton	59
Deed, Gavin to Hitchcock	59
Deed, " & " to Roberts	60
Location notice, Poland	60
Deed, Roberts to Pardridge *et al*	60
Deed, Pardridge *et al.* to Russell	61
Deed, Russell to Lane & Howell	61
Deed, " to Collins	62
Mortgage, " to Roberts	62
Deed, Lane to Collins	63
Deed, Collins to Schofield	64

Deed, Howell to Collins..... 64
Deed, Collins to Thompson..... 68
Judgment-roll, Roberts *v.* Collins *et al*..... 68
Certificate of sale, do. 69
Record of judgment, do. 69
Sheriff's deed to Roberts..... 69
Deed, Lowry, adm'r, to Dickey..... 69
Land records, appl. for patent, Dickey..... 69
Patent, Poland..... 69
Patent, Hamilton..... 70
Deed, Dickey to Murphy..... 70
Deed, Dickey to Arms..... 70
Deed, Murphy to Ferry *et al*..... 70
Deed, Arms to Gage..... 71
Deed, Gage to Ferry *et al*..... 71
Deed, Schofield to Thompson..... 71

Offers of defendants:

Deed, Gage to Ferry *et al*..... 76
Deed, Arms to Gage..... 78
Deed, Murphy to Ferry *et al*..... 78
Deed, Dickey to Arms..... 78
Deed, " to Murphy..... 79
Notice of location amended, Poland..... 79
" " " " 80
Deed, Lowry to Dickey..... 80
Order probate court confirming do..... 81
Ex. "A" (25)..... 83
Land-office proceedings, P. & H. patent..... 84
Patent, Hamilton..... 85
Patent, Poland..... 85

152 Offers of defendants—cont'd:

Deed, sheriff to Roberts..... 86
Sheriff's certificate, etc., do..... 86
Proceedings, Roberts *v.* Collins (record)..... 87
Lis pendens, do. 87
Mortgage, Collins to Roberts..... 88
Deed, Russell to Collins..... 88
Deed, Lane to Collins..... 88
Deed, Howell to " 89
Deed, Collins to Thompson..... 89
Deed, " to Schofield..... 89
Location notice, Hamilton..... 89
All offers of plaintiff adopted; P. & H. tracing title to Collins... 90

Witnesses for plaintiff: D. X.

M. E. Collins..... 65
T. W. Johnston..... 72
Pl'ff rested..... 76

Witnesses for defendants:

Vickers	82 to 139	148
Collins, M. E.	90 to 149	105
Robinson, J. A	110 to 122	118
Foster, J. F	121	126
Lowry, J. R	129	136

152½ *Appendix.*

Being certain deeds, mortgages, etc., offered in evidence.

153 *Deed, Russell to Lane & Howell.*

Edward Russell
to
Charles C. Lane and John Howell.

This indenture made this twenty-fifth day of October in the year of our Lord one thousand eight hundred and eighty-two between Edward W. Russell of Chicago of the county of Cook, and State of Illinois, of the first part, and Charles C. Lane of Boston, Massachusetts, and John Howell, of San José of the county of Mateo and State of California of the second part:

Witnesseth: That the said party of the first part, for and in consideration of the sum of five thousand dollars, lawful money of the United States of America, to the said party of the first part in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, remised, released, conveyed and quitclaimed and by these presents does grant, bargain, sell, remise, release, convey and quitclaim unto the said party of the second part, his heirs and assigns forever, all his right, title, interest claim and demand in and to the following-described mining property, situated in Big Bug mining district, in the county of Yavapai, Territory of Arizona, to wit:

An equal undivided one-half part of the following certain quartz mining claims, lodes, leads, ledges or mineral deposits known
154 as the Poland and Hamilton, the same being two claims so named, which were included with certain other claims in a deed from John M. Roberts and Davis R. Poland to Charles A. Pardridge, Edwin Pardridge and Charles J. Stokes dated the 18th day of March, 1880 and recorded in the recorder's office of Yavapai county in the Territory of Arizona in Book 12 of Deeds at pages 385 and 386.

Together with all the dips, spurs, and angles and variations, also all the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurte-

nances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof and also all the estate, right, title, interest, property, possession, claim and demand, whatsoever, as well in law as in equity, of the said party of the first part in or to the said premises, and every part and parcel thereof, with the appurtenances.

To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

EDWARD W. RUSSELL. [SEAL.]

Signed, sealed and delivered in presence of—

——— ———.

155 STATE OF ILLINOIS, } ss:
County of Cook, }

I, Rufus C. Hall, a notary public in and for the county in the State aforesaid, do hereby certify that Edward W. Russell, who is personally known to me to be the same person whose name is subscribed to the foregoing deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said deed as his free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this 25th day of October, A. D. 1882.

RUFUS C. HALL.
Notary Public.

[L. S.]

TERRITORY OF ARIZONA, } ss:
County of Yavapai, }

I hereby certify that this deed was filed for record at 2:35 o'clock p. m., November 1st, 1882, in my office, and duly recorded in Book 16 of Deeds, page 252, 253, 254, and 255, records of Yavapai county, Arizona.

WILLIAM WILKERSON, *Recorder.*
By D. S. BECHTEL, *Deputy.*

156 B. 16, p. 267.

Deed, Russell to Collins.

Edward W. Russell }
to
Marcellus E. Collins. }

This indenture made this twenty-fifth day of October in the year of our Lord one thousand eight hundred and eighty-two, between Edward W. Russell of Chicago, of the county of Cook and State of Illinois, of the first part, and Marcellus E. Collins of the city of

Chicago, of the county of Cook and State of Illinois, of the second part:

Witnesseth: That the said party of the first part for and in consideration of the sum of one dollar lawful money of the United States of America, to the said party of the first part in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, remised, released, conveyed and quitclaimed, and by these presents does grant, bargain, sell, remise, release, convey and quitclaim unto the said party of the second part, his heirs and assigns forever, all his right, title interest, claim and demand in and to the following-described mining property situated in Big Bug mining district, in the county of Yavapai, Territory of Arizona, to wit:

An equal undivided one-half part of the following certain quartz mining claims, lodes, leads, ledges or mineral deposits known as the Poland, Hamilton, Bullion, Bulger and Mountain Boy.

157 Together with all the dips, spurs, angles and variations.

Also all the metals, ores, gold and silver bearing quartz, rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to, the said premises and every part and parcel thereof, with the appurtenances;

To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

EDWARD W. RUSSELL. [SEAL.]

Signed, sealed, and delivered in presence of—

——— ———.

STATE OF ILLINOIS, } ss:
County of Cook, }

I, Rufus C. Hall, a notary public in and for said county, in the State aforesaid, do hereby certify that Edward W. Russell, who is personally known to me to be the same person whose name is

158 subscribed to the foregoing deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said deed as his free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this 25th day of October, A. D. 1882.

RUFUS C. HALL,
Notary Public.

[L. S.]

TERRITORY OF ARIZONA, }
County of Yavapai, } ss:

I hereby certify that this deed was filed for record at 9.06 o'clock a. m., November 6th, A. D. 1882, in my office, and duly recorded in Book 16 of Deeds, pages 267, 268, 269, 270, records of Yavapai county.

WILLIAM WILKERSON, *Recorder.*
By D. S. BECHTEL, *Deputy.*

159 B. 3, Real M., p. 14.

Mort., Collins to Roberts.

Marcellus E. Collins }
to
John M. Roberts. }

This indenture made this twenty-fifth day of October, A. D. 1883, between Marcellus E. Collins of the county of Yavapai in the Territory of Arizona, party of the first part, and John M. Roberts, of the same county and Territory, party of the second part

Witnesseth: That the said party of the first part for and in consideration of the sum of twenty-six hundred and thirty-three and $\frac{25}{100}$ dollars, lawful money of the United States of America, to him in hand paid does grant, bargain, sell, and convey unto the said party of the second part, and to his heirs and assigns forever, all of the right, title and interest that the said party of the second part has, in and to those certain mines, mining land, mining ground and mining claims, situate, lying and being in the county of Yavapai in the Territory of Arizona, and described as follows, to wit:

That certain mine or mining claim known and called the Hamilton, which said Hamilton claim adjoins the Bell Extension mine on the south in Big Bug mining district in said county and Territory, and which said claim was located by C. E. Hitchcock; and also that certain other mine or mining claim, known and called the Poland, and which said Poland claim adjoins the aforesaid Hamilton claim on the south, and the said Poland claim was located by D. R
160 Poland and is situated in said Big Bug mining district, in said county of Yavapai in the Territory of Arizona; and also that other certain mining claim known and called the Mountain Boy, situate in Big Bug mining district, and about one mile south of said Poland and Hamilton claims, and which said Mountain Boy was located May 25th, 1877 by J. A. Robinson, D. R. Poland and J. M. Roberts, and said location is recorded in Book E 5 Mines page 447. The aforesaid and above-described mining claims are each fifteen hundred feet in length by six hundred feet in width, and are

the same mines and mining claims conveyed by deed by John M. Roberts and Davis R. Poland to Charles W. Pardridge, Edwin Pardridge and Charles J. Stokes, on the 18th day of March, 1880; and for a more complete description of said mines and mining claims reference is hereby made to said deed, a record of which is made in Book 12 of Deeds, folio 385, records of Yavapai county; together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining.

This conveyance is intended as a mortgage to secure the payment of a certain promissory note executed and given by the said party of the first part *of* the said party of the second part, on this day at Prescott, Arizona, and which said note is in the words and figures following:

"$2,633.25. PRESCOTT, A. T., *Oct. 25th*, 1883.

Twelve months after date I promise to pay to the order of John M. Roberts the sum of two thousand six hundred and thirty-
161 three and $\frac{25}{100}$ dollars, with interest, at the rate of one and one-half per cent. per month from date until paid, value received.

M. E. COLLINS."

Now, therefore, if the said party of the first part or any one for him, shall well and truly pay off and discharge said note and the interest due thereon, and every part thereof, according to the true tenor, date and effect thereof, then these presents shall be void and the property hereinbefore conveyed shall be released at the cost of the said party of the first part; but in case default be made in the payment of the said promissory note or interest or any part thereof, as in said promissory note and hereinbefore provided, then the said party of the second part, his executors, administrators and assigns, are hereby empowered to sell the said premises with all and every of the appurtenances or any part thereof, in the manner prescribed by law, and out of the money arising from such sale to retain the said principal and interest together with the costs and charges of making such sale, and a reasonable sum for attorneys' fees, and the overplus, if any there be, shall be paid by the party making such sale on demand to the said party of the first part, his heirs or assigns.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

MARCELLUS E. COLLINS. [L. S.]

162 TERRITORY OF ARIZONA, } ss:
County of Yavapai, }

On this 25th day of October, A. D. one thousand eight hundred and eighty-three, before me, Ed. W. Wells, notary public in and for the county of Yavapai, Territory of Arizona, duly commissioned and sworn, personally appeared Marcellus E. Collins, personally known to me to be the individual described in and who executed

the foregoing instrument, who acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and [L. S.] affixed my official seal the day and year in this certificate first above written.

ED. W. WELLS,
Notary Public.

Recorded at the request of John T. Shull October 25th, 1883, at 20 minutes past 1 o'clock p. m., in Record Book 3 of Mortgages, pages 14, 15, 16, 17, records of Yavapai county, Arizona.

H. H. CARTTER, *Recorder.*
By D. S. BECHTEL,
Deputy Recorder.

163 Deeds B. 18, p. 451.

Deed, Lane to Collins.

Charles C. Lane
to
Marcellus E. Collins.

This indenture made this fourteenth day of November in the year of our Lord one thousand eight hundred and eighty-three, between Charles C. Lane of the county of Yavapai and Territory of Arizona, of the first part, and Marcellus E. Collins of the county of Yavapai and Territory of Arizona of the second part:

Witnesseth: That the said party of the first part for and in consideration of the sum of seven thousand and five hundred dollars, lawful money of the United States of America, to the said party of the first part in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, remised, released, conveyed and quitclaimed, and by these presents does grant, bargain, sell, remise, release, convey and quitclaim unto the said party of the second part, his heirs and assigns forever:

The undivided one-fourth interest in and to the following-described mining property, situated in Big Bug mining district, in the county of Yavapai, Territory of Arizona, to wit: That certain quartz mining claim, lode, lead, ledge or mineral deposit known as the Hamilton and Poland, being so situate, and beginning at the south end of the Bell Extension mining claim and running in a
164 southerly direction:

Together with all the dips, spurs, angles and variations; also all the metals, ores, gold and silver bearing quartz, rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate

right, title, interest, property, possession, claim and demand, whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof with the appurtenances;

To have and to hold, all and singular, the said premises together with the appurtenances and privileges thereto incident, unto the said party of the second part his heirs and assigns forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

C. C. LANE. [SEAL.]

Signed, sealed, and delivered in presence of—

——— ———.

TERRITORY OF ARIZONA, } ss:
County of Yavapai. }

165 I, J. M. W. Moore, a notary public in and for said county, in the Ty. aforesaid, do hereby certify that C. C. Lane, personally known to me to be the same person whose name is subscribed to the foregoing deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said deed as — free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this sixteenth [L. S.] day of November, A. D. 1883.

J. M. W. MOORE.

COUNTY OF YAVAPAI:

I hereby certify that this deed was filed for record at 9 o'clock a. m., January 7th, 1884, in my office, and duly recorded in Book 18 of Deeds, pages No. 452 & 453.

H. H. CARTTER, *Recorder.*

166 B. 18, p. 384.

Deed, Collins to Schofield.

Marcellus E. Collins }
to
Robert Schofield. }

This indenture, made this fourteenth day of November, in the year of our Lord one thousand eight hundred and eighty-three, between Marcellus E. Collins, of the county of Yavapai and Territory of Arizona, of the first part, and Robert Schofield of the county of Yavapai and Territory of Arizona, of the second part;

Witnesseth: That the said party of the first part, for and in consideration of the sum of twelve thousand five hundred dollars, lawful money of the United States of America, to the said party of the first part in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby confessed and acknowledged, has granted, bar-

gained, sold, remised, released, conveyed and quitclaimed, and by these presents does grant, bargain, sell, remise, release, convey and quitclaim unto the said party of the second part, his heirs and assigns forever:

The undivided one-fourth interest in and to the following-described mining property, situated in Big Bug mining district in the county of Yavapai, Territory of Arizona, to wit:

That certain quartz mining claim, lode, lead, ledge or mineral deposit, known as the Hamilton and Poland, being so situate and beginning at the south end of the Bell Extension mining
167 claim, and running in a southerly direction, containing in all three thousand feet, more or less.

Together with all the dips, spurs, angles and variations, also all the metals, ores, gold and silver bearing quartz, rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part of, in or to the said premises, and every part and parcel thereof, with the appurtenances;

To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

MARCELLUS E. COLLINS. [SEAL.]

Signed, sealed and delivered in the presence of—

——, ——.

TERR'Y OF ARIZONA, }
County of Yavapai, } ss:

168 I, W. E. Hazeltine, notary in and for said county, in the State aforesaid, do hereby certify that Marcellus E. Collins, personally known to me to be the same person whose name is subscribed to the foregoing deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said deed as his free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this sixteenth day of November, A. D. 1883.

[L. S.] W. E. HAZELTINE, *Notary.*

TERRITORY OF ARIZONA, }
County of Yavapai. }

I hereby certify that this deed was filed for record at 4 o'clock p. m., December 15th, A. D. 1883, in my office, and duly recorded

in Book 18 of Deeds, pages Nos. 384, 385, 386, records of Yavapai county, Arizona.

H. H. CARTTER, *Recorder*,
By D. S. BECHTEL, *Deputy*.

169 B. 19, p. 263.

Deed, Howell to Collins.

John Howell
to
M. E. Collins.

This indenture, made this sixteenth day of November in the year of our Lord one thousand eight hundred and eighty, between John Howell of the county of Yavapai and Territory of Arizona, of the second part

Witnesseth: That the said party of the first part for and in consideration of the sum of twenty-five hundred dollars lawful money of the United States of America, to the said party of the first part in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, remised, released, conveyed and quitclaimed, and by these presents does grant, bargain, sell, remise, release, convey and quitclaim unto the said party of the second part, his heirs and assigns forever, the undivided one-fourth interest in and to the following-described mining property, situated in Big Bug mining district, in the county of Yavapai, Territory of Arizona, to wit: that certain quartz mining claim, lode, lead, ledge or mineral deposit known as the Hamilton and Poland, being so situate and beginning at the south end of the Bell Extension mining claim and running in a southerly direction.

Together with all the dips, spurs, angles, and variations,
170 also all the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of in or to the said premises and every part and parcel thereof with the appurtenances.

To have and to hold all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

JOHN HOWELL. [SEAL.]

Signed, sealed, and delivered in presence of—

—— ——.

TER'TY OF ARIZONA, }
County of Mohave, } ss:

I, Warren E. Day, notary public in and for said county, in
171 the Ter'ty aforesaid, do hereby certify that John Howell, personally known to me to be the same person whose name is subscribed to the foregoing deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said deed as his free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and official seal this eighth day of December, A. D. 1883.

[L. S.] WARREN E. DAY,
Notary Public.

TERRITORY OF ARIZONA, }
County of Yavapai. }

I hereby certify that this deed was filed for record at 3.57 o'clock p. m., June 18th, 1884, in my office, and duly recorded in Book 19, Deeds, pages No. 263 & 264.

H. H. CARTTER, *Recorder.*

172 B. 19, p. 401.

Deed, Collins to Thompson.

M. E. Collins }
to
B. F. Thompson. }

This indenture, made this eighteenth day of August, in the year of our Lord one thousand eight hundred and eighty-four between M. E. Collins of the county of Yavapai and Territory of Arizona, of the first part, and B. F. Thompson, town of Greenwood, of the county of Clark and State of Wisconsin, of the second part:

Witnesseth: That the said party of the first part for and in consideration of the sum of twelve thousand five hundred dollars, lawful money of the United States of America, to the said party of the first part in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, remised, released, conveyed and quitclaimed, and by these presents does grant, bargain, sell, remise, release, convey and quitclaim unto the said party of the second part, his heirs and assigns forever, the equal undivided one-fourth interest in and to the following-described mining property situated in Big Bug mining district in the county of Yavapai, Territory of Arizona, to wit:

That certain quartz mining claim, lode, lead, ledge or min-
173 eral deposit known as the Hamilton and Poland being so situate and beginning at the south end of the Bell Extension mining claim and running thence in a southerly direction 3,000 feet,

more or less, to the Poland Extension situate on the west side of Big Bug creek, about one-half of a mile from said creek in what is known as Poland & Roberts' old camp.

Together with all the dips, spurs, angles and variations, also all the metals, ores, gold and silver, bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant or therewith usually had and enjoyed and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining and the rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part of, in or to the said premises and every part and parcel thereof with the appurtenances:

To have and to hold all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part — heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

M. E. COLLINS. [SEAL.]

Signed, sealed, and delivered in presence of—

—— ——.

174 TERRITORY OF ARIZONA, } ss:
County of Yavapai. }

On this day personally appeared before me, county recorder of the county of Yavapai, in the Territory of Arizona, M. E. Collins, known to me to be the person described in and who executed the foregoing deed, who acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and
[L. S.] affixed my seal of office at Prescott, in said county, this the 19th day of August, A. D. 1884.

H. H. CARTTER,
County Recorder.

TERRITORY OF ARIZONA, }
County of Yavapai. }

I hereby certify that this deed was filed for record at 9 o'clock a. m., August 19th, 1884, in my office, and duly recorded in Book 19, Deeds, pages No. 401, 402, 403.

H. H. CARTTER, *Recorder.*

175 *Complaint & Judgment.*

From judgment-roll in Roberts *vs.* Collins *et al.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Yavapai.

JOHN M. ROBERTS, Plaintiff,
vs.
MARCELLUS E. COLLINS, ROBERT SCHOFIELD, and B. H. Thompson, Defendants. } (Complaint.)

The above-named plaintiff complains of the above-named defendants, and for cause of action alleges:

I.

That heretofore, to wit, on the 25th day of October, 1883, at the county of Yavapai, in the Territory of Arizona, the said defendant, Marcellus E. Collins, made his certain promissory note in writing, bearing date on that day, whereby he, for value received, undertook and promised to pay to said plaintiff, twelve months after the date thereof, the sum of two thousand six hundred and thirty-three and $\frac{25}{100}$ dollars, with interest thereon at the rate of one and one-half per cent. per month from date until paid; which said promissory note is in the words and figures following, to wit:

"$2,633.25. PRESCOTT, A. T., *October* 25, 1883.

176 Twelve months after date I promise to pay to the order of John M. Roberts the sum of two thousand six hundred and thirty- — and $\frac{25}{100}$ dollars, with interest at the rate of one and one-half (1½) per cent. per month from date until paid, value received.

M. E. COLLINS."

and then and there delivered the same to said plaintiff.

II.

That afterward, to wit, on said 25th day of October, 1883, at said county of Yavapai, said Marcellus E. Collins, to secure the payment of the said principal sum and the interest thereon, as mentioned in said promissory note, according to the tenor thereof, did make and execute, under his hand and seal, and deliver to the said plaintiff, his certain mortgage bearing date on said 25th day of October, 1883, and conditioned for the payment of the said sum of two thousand six hundred and thirty-three and $\frac{25}{100}$ dollars and interest thereon at the rate and at the time and in the manner specified in said mortgage and the said promissory note, which said mortgage was duly acknowledged and certified so as to entitle it to be recorded, and the same was afterwards, to wit, on the said 25th day of October, 1883, duly recorded in the office of the county recorder of said county of Yavapai, in Book 3 of Mortgages, at pages 514, 515, 516, 517, records

of said county of Yavapai, all of which will more fully appear by reference to said mortgage, a copy of which is hereto attached, marked Exhibit "A," and is hereby made a part of this complaint.

That said defendant, Marcellus E. Collins, by said mort-
177 gage granted, bargained, sold, and conveyed to plaintiff, for the purposes aforesaid, all his right, title, and interest of, in, and to those certain mines, mining land, and mining claims as follows, to wit: That certain mining claim known, named, and called the "Hamilton," the same adjoining the Bell Extension claim or mine on the south, in Big Bug mining district, and which was located by C. E. Hitchcock; and also that certain other mine and mining claim known and called the "Poland;" which said Poland claim adjoins the aforesaid Hamilton claim on the south and was located by D. R. Poland; and also that certain other mining claim known and called the "Mountain Boy," situate about one mile south of said Poland claim, and which said Mountain Boy mining claim was located by I. A. Robinson, D. R. Poland, and J. M. Roberts; that each of said mining claims is fifteen hundred feet in length by six hundred feet in width; and that each and all said mining claims are situate in the Big Bug mining district, in the county of Yavapai, in the Territory of Arizona.

III.

That the said promissory note is long since past due; that defendant has not paid the same, except that on the 25th day of October, 1883, the defendant Marcellus E. Collins paid to plaintiff on said note the sum of six hundred dollars; which said sum is endorsed as a credit on said note; that there is now due and owing from
178 said defendant and to plaintiff on said note for principal the sum of two thousand and thirty-three & $\frac{25}{100}$ dollars, with interest on said last-mentioned sum from the said 25th day of October, 1883, at the rate of one and one-half per cent. per month, no part of which has been paid.

IV.

And plaintiff alleges that he is the lawful holder and owner of said note and mortgage.

V.

And plaintiff alleges that by said mortgage it was stipulated that in case default was made by defendant and suit for foreclosure be had, that plaintiff might and should recover a reasonable attorney's fee, and plaintiff alleges that two hundred and fifty dollars is a reasonable attorney's fee for foreclosure of said mortgage.

VI.

And plaintiff alleges that said defendant-, Robert Schofield and B. F. Thompson, claim some interest, by purchase or otherwise, in and to said mortgaged premises, and plaintiff alleges that whatever of interest or claim they or either of them may have in or to said mortgaged premises was acquired by them and each of them after

the making and recording said mortgage, as aforesaid, and is subsequent and subject thereto.

Wherefore plaintiff prays judgment against the said defendant, Marcellus E. Collins, for the sum of two thousand and thirty-
179 three & $\frac{25}{100}$ dollars, with interest thereon, at the rate of one and one-half per cent. per month, from the 25th day of October, 1883, and for two hundred and fifty dollars for attorney's fees, and for costs of suit.

That the usual decree for the sale of said mortgaged premises by the sheriff of said county be made according to law and the practice of this court, and the proceeds of said sale be applied to the payment of the expenses of said sale and the amount due plaintiff.

That the interest or claim of said defendants, Robert Schofield and B. F. Thompson, and each of them to said mortgaged premises be decreed subject to said mortgage.

That said defendants and each of them and all persons claiming under them or either of them subsequent to the execution of said mortgage upon said premises, either as purchasers, incumbrancers, or otherwise, may be barred and foreclosed of all right, claim, or equity of redemption in the said premises and every part thereof, and that the said plaintiff may have judgment and execution against the said defendant, Marcellus E. Collins, for any deficiency which may remain after applying all the proceeds of the sale of said premises properly applicable to the satisfaction of said judgment.

That plaintiff or either of the parties to this suit may become purchasers at said sale; that the sheriff execute a deed to the
180 purchaser; that the purchaser be let into the possession of the premises upon production of the sheriff's deed therefor, and that plaintiff have such other or further relief in the premises as to the court may seem meet and equitable.

RUSH, WELLS, AND HOWARD,
Attorneys for Plaintiff.

TERRITORY OF ARIZONA, }
County of Yavapai, } *ss:*

This day personally appears John M. Roberts, who, being duly sworn, upon his oath says that he is the plaintiff in the above-entitled action; that he has heard read the above and foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except the matters therein stated on information and belief, and as to those matters he believes it to be true.

JOHN M. ROBERTS.

Subscribed and sworn to before me this 21st day of August, 1886.

[SEAL.] E. W. WELLS,
Notary Public, Yavapai County, A. T.

181 EXHIBIT "A" TO COMPLAINT.

This indenture made this twenty-fifth day of October, A. D. 1883, between Marcellus E. Collins of the county of Yavapai in the Territory of Arizona, party of the first part; and John M. Roberts, of the same county and Territory, party of the second part:

Witnesseth: That the said party of the first part for and in consideration of the sum of twenty-six hundred and thirty-three and $\frac{25}{100}$ dollars lawful money of the United States of America to him in hand paid, does grant, bargain, sell and convey unto the said party of the second part and to his heirs and assigns forever, all of the right, title and interest that the said party of the second part has in and to these certain mines, mining land, mining ground and mining claims situate, lying and being in the county of Yavapai in the Territory of Arizona and described as follows, to wit:

That certain mine or mining claim known or called the Hamilton, which said Hamilton claim adjoins the Bell Extension mine on the south in Big Bug mining district in said county and Territory, and which said claim was located by C. E. Hitchcock; and also that certain other mine or mining claim known and called the Poland, and which said Poland claim joins the aforesaid Hamilton claim on the south, and the said Poland claim was located by D. R. Poland,

182 and is situated in said Big Bug mining district in said county of Yavapai in the Territory of Arizona; and also that certain other mining claim known and called the Mountain Boy, situate in Big Bug mining district, and about one mile south of said Poland and Hamilton claims, and which said Mountain Boy was located May 25th, 1877 by J. A. Robinson, D. R. Poland and J. M. Roberts, and said location is recorded in Book E 5 of Mines, page 447. The aforesaid and above-described mining claims are each fifteen hundred feet in length by six hundred feet in width and are the same mines and mining claims conveyed by deed by John M. Roberts and Davis R. Poland to Charles W. Partridge, Edwin Partridge and Charles J. Stokes on the 18th day of March, 1880, and for a more complete description of said mines and mining claims reference is hereby made to said deed, a record of which is made in Book 12 of Deeds, folio 385, records of Yavapai county; together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining.

This conveyance is intended as a mortgage to secure the payment of a certain promissory note executed and given by the said party of the first part to the said party of the second part on this day at Prescott, Arizona, and which said note is in the words and figures following:

"$2,633.25. PRESCOTT, A. T., *Oct. 25th*, 1883.

Twelve months after date, I promise to pay to the order of John M. Roberts the sum of two thousand six hundred and thirty-three and $\frac{25}{100}$ dollars, with interest at the rate of one and one-half per cent. (1½) per month from date until paid, value received.

M. E. COLLINS."

183 Now therefore, if the said party of the first part or any one for him shall well and truly pay off and discharge said note and the interest due thereon and every part thereof according to the true tenor, date and effect thereof, then these presents shall be void and the property hereinbefore conveyed shall be released at the cost of the said party of the first part, but in case default be made in the payment of the said promissory note or interest or any part thereof as in said promissory note and hereinbefore provided, then the said party of the second part, his executors, administrators and assigns are hereby empowered to sell the said premises with all and every of the appurtenances or any part thereof in the manner prescribed by law and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of making such sale, and a reasonable sum for attorney's fees and the overplus, if any there by, shall be paid to the party making such sale on demand to the said party of the first part, his heirs or assigns.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

MARCELLUS E. COLLINS. [L. S.]

TERRITORY OF ARIZONA, } ss:
County of Yavapai, }

184 On this 25th day of October, A. D. one thousand eight hundred and eighty-three, before me, Ed. W. Wells, notary public in and for the county of Yavapai, Territory of Arizona, duly commissioned and sworn, personally appeared Marcellus E. Collins, personally known to me to be the individual described in and who executed the foregoing instrument, who acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

ED. W. WELLS,
[L. S.] *Notary Public.*

(Endorsed:) Recorded at the request of John T. Shull, October 25th, 1883, at 20 minutes past 1 o'clock p. m., in Record Book 3 of Mortgages, pages 14, 15, 16, 17, records of Yavapai county, Arizona. H. H. Cartter, by D. S. Bechtel, deputy recorder.

185 *Judgment, Roberts v. Collins.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Yavapai.

JOHN M. ROBERTS, Plaintiff,
vs.
MARCELLUS E. COLLINS, ROBERT SCHOFIELD, and B. F. THOMPSON, Defendants. } (Judgment and Decree.)

This cause coming regularly to be heard on this 15th day of December, 1886, the same being a day of the regular November term, 1886, of this court, and it appearing that the defendants, Marcellus E. Collins, Robert Schofield, and B. F. Thompson, and each of them, has been regularly served with summons, and that they and each of them have failed to appear in this action within the time allowed by law, but made default, and that the default of said defendants and each of them had been regularly entered herein, and the plaintiff appearing by his attorneys, Messrs. Rush, Wells and Howard, and a jury having been waived, the cause was submitted to the court for decision upon the pleadings and proofs introduced on the part of plaintiff; and the court having fully considered the matter and having filed herein in writing its findings of fact and conclusions of law, directing that judgment and decree be entered herein in favor of plaintiff and against defendants in accordance with the prayer of plaintiff's complaint,

186 and it appearing that plaintiff had given due notice of the pendency of this action by filing with the county recorder of the county of Yavapai, the county in which the mortgaged property is situate, a notice of the pendency of this action, the parties thereto, and the property affected thereby, on the 31st day of August, 1886; and it also appearing that there is now due and owing from the defendant Marcellus E. Collins to plaintiff, on the note sued on — this action, for principal and interest, three thousand one hundred and seventy-seven and $\frac{19}{100}$ dollars, and that said note bears interest at the rate of one and one-half per cent. per month, and that all the allegations contained in said plaintiff's complaint are true:

Wherefore, by reason of the premises and the law and the findings aforesaid, which are duly filed herein, it is ordered, adjudged, and decreed:

1st. That the plaintiff, John M. Roberts, do have and recover of and from the defendant Marcellus E. Collins the sum of three thousand one hundred and seventy-seven and $\frac{19}{100}$ dollars, with interest thereon from the date hereof at the rate of one and one-half per cent. per month, and also for the sum of two hundred and fifty dollars for counsel fees, and for costs, taxed at the sum of twenty and $\frac{25}{100}$ dollars.

2nd. That all and singular the mortgaged premises mentioned in plaintiff's complaint and hereinafter described, or so much thereof

as may be sufficient to raise the amount due to the plaintiff for
principal and interest and costs in this suit and expenses
187 of sale, be sold at public auction by or under the direction of
the sheriff of the county of Yavapai, A. T., where said mort-
gage- premises are situate; that said sale be made at the court-house,
in the city of Prescott, in said county of Yavapai; that said sheriff
give public notice of the time and place of such sale, according to
the course and practice of this court and the law in relation to the
sales of real estate under execution, and that plaintiff or any of the
parties to this suit may become the purchaser at such sale, and
that the said sheriff, after the time allowed by law for redemption
has expired, execute a deed to the purchaser or purchasers of the
mortgaged premises on the said sale.

3rd. That the said sheriff out of the proceeds of said sale retain his fees, disbursements, and commissions on said sale, and pay to the plaintiff or his attorneys out of said proceeds his costs in this suit, taxed at — dollars, and the sum of two hundred and fifty dollars allowed by the court as counsel fees for foreclosure, with ten per cent. per annum thereon from this date, and also the sum of three thousand one hundred and seventy-seven and $\frac{12}{100}$ dollars so found due, as aforesaid, with interest thereon from this date at the rate of one and one-half per cent. per month, or so much thereof as the
proceeds of sale will pay of the same.

188 4th. That the said defendants, Marcellus E. Collins, Robert Schofield, and B. F. Thompson, and each of them, and all persons claiming or to claim from or under them or either of them, and all persons having liens subsequent to said mortgage by judgment or decree upon the lands described in said mortgage, and all persons having any lien or claim by or under such subsequent judgment or decree and their heirs or personal representatives, and all persons claiming under them, and all persons claiming to have acquired any estate or interest in said premises subsequent to the filing of said notice of the pendency of this action with the recorder, as aforesaid, be forever barred and foreclosed of and from all equity of redemption and claim in, of, and to said mortgaged premises and every part thereof from and after the delivery of the said sheriff's deed.

5th. And it is further adjudged and decreed that the purchaser or purchasers of said mortgaged premises at such sale be let into the possession, and that any of the parties to this action who may be in possession of said premises or any part thereof, and any person since the commencement of this action has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers on production of the sheriff's deed for such premises or any part thereof.

6th. And it is further ordered, adjudged, and decreed that if the moneys arising from the said sale shall be insufficient to pay the
amount so found to be due plaintiff, as above stated, with the
189 interest and costs and expenses of sale, as aforesaid, the sheriff
specify the amount of such deficiency and balance due the plaintiff in his return of said sale, and that on the coming in of said return a judgment of this court be docketed for such balance against

the defendant Marcellus E. Collins, who is personally liable for the payment of the debt secured by said mortgage — pay to plaintiff the amount of such deficiency and judgment, with interest thereon, at the rate of one and one-half per cent. per month from the date of said last-mentioned return and judgment, and that plaintiff have execution thereof.

The description and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to or from the complaint filed in this action, are as follows, to wit:

Being that particular mining lands, mining grounds, and mining claims situate in the Big Bug mining district, in the county of Yavapai, in the Territory of Arizona, and being described as follows, to wit: That certain mining claim known and called the Hamilton, adjoining the Bell Extension mine, in said Big Bug mining district, on the south, and which was located by C. E. Hitchcock, which said mining claim is fifteen hundred feet in length by six hundred feet in width, and that certain other mining claim known and called the Poland, which said Poland claim adjoins the aforesaid Hamilton claim on the south, and was located by
D. R. Poland, the same being fifteen hundred feet in
190 length by six hundred feet in width, and also that certain
other mining claim, known and called the Mountain Boy, situate about one mile south of said Poland claim, and which Mountain Boy mining claim was located by J. A. Robinson, D. R. Poland, and J. M. Roberts on the 25th day of May, 1877, a notice of which location is recorded in the office of the county recorder of said county of Yavapai, in Book E 5 of Mines, at pages 447, the said Mountain Boy claim being fifteen hundred feet in length by six hundred feet in width.

(Signed) WM. W. PORTER,
District Judge.

Dec'r 15, 1886.

191 B. 23 of Deeds, p. 95.

Certificate of Sale.

William J. Mulvenon, Sheriff of Yavapai County, A. T., to John M. Roberts. } Sheriff's Certificate of Sale on Foreclosure.

I, W. J. Mulvenon, sheriff of the county of Yavapai, in the Territory of Arizona, do hereby certify that under and by virtue of an order of sale issued out of the district court in and for the county of Yavapai, in said Territory of Arizona, in the action of John M. Roberts *vs.* Marcellus E. Collins, Robert Schofield, and B. H. Thompson, rendered on the 15th day of December, 1886, and entered the 15th day of December, 1886, duly attested the 19th day of February, 1887, and to me as such sheriff duly directed and delivered, whereby I was commanded to sell the property hereinafter described accord

ing to law, and to apply the proceeds of such sale towards the satisfaction of the judgments in said action, amounting to the sum of three thousand one hundred and seventy-seven dollars, — of the United States, with interest and costs of suit, I duly levied on, and on the 17th day of March, 1887, at one o'clock p. m., at the courthouse door, in the city of Prescott, county of Yavapai, I duly sold at public auction, according to law, and after due and legal notice, to John M. Roberts, who made the highest and best bid therefor at such sale for the sum of two thousand and fifty dollars, which was the whole sum paid by him, the real estate in said order of sale described as follows, to wit: All that particular mining
192 lands, mining grounds, and mining claims situate in the Big Bug mining district, in the county of Yavapai, in the Territory of Arizona, and being described as follows, to wit: That certain mining claim known and called the Hamilton, adjoining the Bell Extension mine, in said Big Bug mining district, on the south, and which was located by C. E. Hitchcock; which said mining claim is fifteen hundred feet in length by six hundred feet in width, and that certain other mining claim known and called the Poland, which said Poland claim adjoins the aforesaid Hamilton claim on the south, and was located by D. R. Poland, the same being fifteen hundred feet in length by six hundred feet in width; and also that certain other mining claim known and called the Mountain Boy, situated about one mile south of said Poland claim, and which said Mountain Boy mining claim was located by J. A. Robeson, D. R. Poland, and J. M. Roberts on the 25th day of May, 1877, a notice of which location is recorded in the office of the county recorder of said county of Yavapai, in Book 5 of Mines, at page 447, the said Mountain Boy claim being fifteen hundred feet in length by six hundred feet in width; and I do hereby further certify that the said property was sold in separate lots or parcels, and that the said sum of two thousand and fifty dollars was bid for said property in the following manner, to wit: For the Hamilton claim, the sum of five hundred (500) dollars; for the Mountain Boy, the sum of
193 fifty (50) dollars; for the Poland mine, the sum of fifteen hundred (1,500) dollars, making a total of said two thousand and fifty dollars, which was the highest bid made and the whole price paid therefor, and that the same is subject to redemption in six months from the date hereof, pursuant to the statute in such case made and provided.

Given under my hand this 17th day of March, 1887.

W. J. MULVENON, *Sheriff.*

Filed in the office of the county recorder of the county of Yavapai this 17th day of March, 1887, and recorded in Book 23 of Deeds, pages 95 to 97, at request of John M. Roberts, March 18th, A. D. 1887, at 9.20 o'clock a. m., records of Yavapai county, Arizona.

E. J. F. HORNE,
County Recorder.

194 B. 23, p. 449.

Sheriff's Deed.

W. J. Mulvenon, Sheriff,
to
John M. Roberts.

This indenture, made this thirtieth day of September, 1887, between W. J. Mulvenon, sheriff of the county of Yavapai, Territory of Arizona, of the first part, and John M. Roberts of said county and Territory of the second part;

Witnesseth: Whereas, in and by a certain judgment or decree rendered by the district court of the third judicial district of the Territory of Arizona, in and for the county of Yavapai, on the fifteenth day of December, 1886, and entered on the fifteenth day of December 1886, in a certain action then pending in said court, wherein John M. Roberts was plaintiff and Marcellus E. Collins, Robert Schofield and B. H. Thompson were defendants, and of which said judgment or decree a certified copy was delivered to said party of the first part as such sheriff, for execution, it was, among other things, ordered, adjudged and decreed, that all and singular the mortgaged premises described in the complaint in said action and specifically described in said judgment or decree, be sold at public auction by the sheriff of the county of Yavapai, in the manner required by law and according to the course and practice of said court; that such sale be made in front of the court-house, in the city of Prescott, Yavapai county, on such day as the said sheriff
195 shall appoint; that any of the parties to said action might become the purchaser at said sale; and that said sheriff execute the usual certificates and deed to the purchaser as required by law.

And whereas, the said sheriff did at the hour of one o'clock p. m. on the seventeenth day of March, 1887, after due and legal public notice had been given as required by the law of this Territory and the course and practice of said court, duly sell at public auction in front of the court-house, in the city of Prescott, Yavapai county, agreeably to the said judgment or decree, and the provisions of law, the premises in said judgment or decree, mentioned; at which sale the premises in said decree or judgment and hereinafter described, were fairly struck off to the said John M. Roberts, the said party hereto of the second part for the sum of three thousand one hundred and seventy-seven ($3,177.00) dollars, he being the highest bidder, and that being the highest sum bidden for the same;

And whereas the said party of the second part thereupon paid to the said sheriff the said sum of money so bidden by him;

And whereas, the said sheriff thereupon made and issued the usual certificate in duplicate, of the said sale in due form of law, and delivered one thereof to the said purchaser, and caused the other to be filed and recorded in the county recorder's office of the county of Yavapai, Arizona Territory;

And whereas, more than six months have elapsed since
196 the date of said sale, and no redemption has been made of the premises so sold as aforesaid by or on behalf of the said judgment debtors, the said defendants, or by or on behalf of any other person:

Now this indenture witnesseth: That the said party of the first part, the said W. J. Mulvenon, sheriff, in order to carry into effect the sale so made by him as aforesaid, in pursuance of said judgment or decree, and in conformity with the statute in such case made and provided, and also in consideration of the premises, and of the said sum of three thousand one hundred and seventy-seven dollars, so bidded and paid to him by the said purchaser, the said John M. Roberts, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, and conveyed, and by these presents doth grant, bargain, sell and convey unto the said party of the second part and to his heirs and assigns forever, all that particular mining lands, mining grounds and mining claims, situate in the Big Bug mining district in the county of Yavapai, Territory of Arizona, and being described as follows, to wit:

That certain mining claim known and called the Hamilton, adjoining the Bell Extension mine, in said Big Bug mining district on the south, and which was located by C. E. Hitchcock; which said mining claim is fifteen hundred feet in length by six hundred feet in width, and that certain other mining claim
197 known and called the Poland, which said Poland claim adjoins the aforesaid Hamilton claim on the south and was located by D. R. Poland the same being fifteen hundred feet in length by six hundred feet in width; and also that certain other mining claim known and called the Mountain Boy situated about one mile south of said Poland claim, and which said Mountain Boy mining claim was located by J. A. Robeson, D. R. Poland and J. M. Roberts on the 25th day of May, 1887, a notice of which location is recorded in the office of the county recorder of said county of Yavapai, in Book 5 of Mines at page 447, the said Mountain Boy claim being fifteen hundred feet in length by six hundred feet in width.

Together with all and singular the tenements, heraditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To have and to hold, all and singular, the premises above mentioned and described and hereby conveyed or intended so to be, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part to these presents, sheriff, as aforesaid, hath hereunto set his hand and seal the day and year first above written.

[SEAL.] W. J. MULVENON,

Sheriff of the County of Yavapai, Territory of Arizona.

198 TERRITORY OF ARIZONA, }
County of Yavapai, } ss:

On this 30th day of September, in the year one thousand eight hundred and eighty-seven, before me, E. J. F. Horne, county recorder in and for said county, personally appeared W. J. Mulvenon, sheriff in and for said county, personally known to me to be the person described in and whose name is subscribed to the annexed instrument, and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[L. S.] E. J. F. HORNE,
County Recorder.

Recorded, at request of John M. Roberts, Oct. 15, A. D. 1887, at 3:35 o'clock p. m., in Book 23 of Deeds, pages 449–452, records of Yavapai county, Arizona.

[L. S.] E. J. F. HORNE,
County Recorder.

199 B. 30, 197.

Deed, Lowry, Adm'r, to Dickey.

John M. Roberts to E. M. Dickey. } Deed.

This indenture, made the 20th day of July, anno Domini eighteen hundred and ninety-one at Prescott, Territory of Arizona, by and between James R. Lowry, the duly appointed, qualified and acting administrator of the estate of John M. Roberts, deceased, the party of the first part, and E. M. Dickey of the party of the second part,

Witnesseth: That whereas, on the 3rd day of February, eighteen hundred and ninety-one, the probate court, within and for the county of Yavapai, Territory of Arizona, made an order of sale authorizing the said party of the first part to sell certain real estate of the said John M. Roberts deceased, situated in Big Bug mining district, Yavapai county, Territory of Arizona, and specified and particularly described in said order of sale, either in one parcel or subdivisions, as the said party of the first part should judge most beneficial to said estate; and which said order of sale now on file and of record in the said probate court, is hereby referred to and made a part of this indenture;

And whereas, under and by virtue of said order of sale, and pursuant to legal notices given thereof, the said party of the first part,

200 on the 25th day of June A. D. eighteen hundred and ninety-one at the city of Prescott, in said Territory, between the hours of nine o'clock in the morning and the setting of the sun of the same day, to wit: at 12 o'clock m. offered for sale in one

parcel (judging it most beneficial to said estate) at private sale and subject to confirmation of said court, the said real estate, situated in the said Big Bug mining district and specified and described in said order of sale as aforesaid, and at such sale the said party of the second part became the purchaser of the two mining claims and said real estate hereinafter particularly described, for the sum of five thousand dollars, U. S. gold coin, he being the highest and best bidder, and that being the highest and best sum bid.

And whereas, the said probate court, upon the due and legal return of said proceedings under the said order of sale, made by the said party of the first part on the 27th day of June, eighteen hundred and ninety-one, after making the said sale, did on the 7th day of July, eighteen hundred and ninety-one, make an order confirming said sale, and directing conveyance to be executed to the said party of the second part; a certified copy of which order of confirmation was recorded in the office of the county recorder of said county of Yavapai within which the said land sold is situated, on the 20th day of July, A. D. eighteen hundred and ninety-one, and which said order of confirmation — now on file and of record in said probate court, and which said record thereof in said recorder's
201 office is hereby referred to and made a part of this indenture.

Now, therefore, the said James R. Lowry, administrator of said John M. Roberts, deceased, as aforesaid, the party of the first part, pursuant to the order last aforesaid, of the said probate court, for and in consideration of the said sum of five thousand dollars, U. S. gold coin to him in hand paid by the said party of the second part, receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns forever, all the right, title, interest and estate of the said John M. Roberts, deceased, at the time of his death, and also all the right, title and interest that the said estate by operation of law or otherwise, may have acquired other than, or in addition to, that of said intestate at the time of his death, in and to all those certain lots, pieces, or parcels of land, situate, lying and being in said county of Yavapai, Territory of Arizona, and bounded and more particularly described as follows, to wit:

All of that particular mine or mining claim known, named and designated as the "Poland" mining claim, the notice of location whereof is of record in Book C 3 of Mines, page 309, records of said county of Yavapai; also all of the Hamilton mine or mining claim, the location notice whereof is recorded in said office in Book C 3 of Mines at page 416; said mines and mining claims being situ-
202 ate lying and located in the Big Bug mining district, in said county of Yavapai, and Territory of Arizona, which said Poland mining claim is described as follows: Commencing at the notice of location and running southwesterly 1,500 feet to a monument with 300 feet on each side of the vein; the ledge is situated ¾ of a mile of the Bell mine southeast, and one mile south of the Bulger mine, and ½ from Big Bug creek, and five miles of Big Bug mill.

And the said "Hamilton" mine is bounded and described as follows: Commencing at a stake 300 feet northwest of a pine tree blazed where the notice of location is posted, running thence northeasterly parallel with the vein 1,500 feet to a monument, thence southeasterly at right angles across the vein 600 feet to a monument, thence southwesterly parallel with the vein 1,500 feet to a monument, thence northwesterly at right angles with the vein 600 feet to the place of beginning; and for any other or further description of said mining claims or either of them reference is hereby made to the record as above referred to of said location notices; together with all the tenements, hereditaments and appurtenances whatsoever, to the same belonging or in anywise appertaining.

To have and to hold, all and singular, the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

203 In witness whereof, the said party of the first part administrator of the estate of John M. Roberts as aforesaid, has hereunto set his hand and seal the day and year first above written.

J. R. LOWRY, [SEAL.]
Administrator of the Estate of John M. Roberts, Deceased.

Signed, sealed, and delivered in the presence of—
JNO. J. HAWKINS.

TERRITORY OF ARIZONA, } ss:
County of Yavapai, }

Before me, John J. Hawkins, a notary public in and for said county of Yavapai, on this day personally appeared James R. Lowry, administrator of the estate of John M. Roberts, dec'd, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he, as such administrator, executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 21st day of July, A. D. 1891.

JNO. J. HAWKINS,
[L. S.] *Notary Public.*

Recorded, at the request of F. M. Murphy, July 27th, A. D. 1891, at 40 minutes past 11 o'clock a. m., in Book 30 of Deeds, page 197, records of Yavapai county, Arizona.

CHARLES H. AKERS,
[L. S.] *County Recorder,*
By J. W. AKERS, *Deputy.*

204 TERRITORY OF ARIZONA, } ss:
County of Yavapai, }

I, Richard S. Stockton, official court reporter of the fourth judicial district of the Territory of Arizona and the district court of said county, do hereby certify that the foregoing pages, numbered from 1 to 77, constitute a full, true, correct, and complete tran-

script of my shorthand notes of all the testimony in the case B. F. Thompson, plaintiff, *vs.* D. M. Ferry *et al.*, defendants (No. 2618), tried in said district court August 19th, 1897, and that said shorthand notes so taken of said testimony in said cause were full, true, and correct to the best of my skill and ability; that the foregoing appendix, including pages from 1 to 51 thereof, contain full, true, and complete copies of documents offered in evidence on the trial of said cause, and which said documents are referred to in the foregoing transcript of testimony taken by me in said trial.

In witness whereof I have hereunto set my hand this 7th day of July, A. D. 1898, at Prescott, Arizona.

RICHARD S. STOCKTON.

205 *Index.*

	Page.
Deed, Russell to Lane & Howell, B. 16, p. 252	153
" Russell to Collins, B. 16, p. 267	156
Mortgage, Collins to Roberts, B. 3 R. M., p. 14	159
Deed, Lane to Collins, B. 18, p. 451	163
Deed, Collins to Schofield, B. 18, p. 384	166
Deed, Howell to Collins, B. 19, p. 263	169
Deed, Collins to Thompson, B. 19, p. 401	172
Complaint and judgment, Roberts *vs.* Collins	175
Certificate of sale, B. 23 Deeds, p. 95	191
Deed of sheriff, B. 23, 449	194
Deed, Lowry, adm'r, to Dickey, B. 30, 197	199

206 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

B. F. THOMPSON, Plaintiff,
vs.
SIMON J. MURPHY, C. C. BOWEN, and D. M. Ferry, Defendants.

Decision. Filed at 3.30 o'clock p. m., Dec. 22, 1897. J. M. Watts, Clerk.

Decision.

The plaintiff sues defendants to quiet title to an undivided one-half interest in and to the Poland-Hamilton mining claims, situated in the Big Bug mining district, Yavapai county, Arizona.

The facts in the case show that the Hamilton mining claim was located by William Gavin on the 27th day of September, 1875; that on the 24th day of January, 1876, said Gavin conveyed an undivided two-thirds interest in said claim to one Eloza P. Hitchcock, who, together with William Gavin, conveyed to John M. Roberts on the 17th of April, 1876.

The facts further show that the Poland mining claim was located by D. R. Poland on the 2nd day of August, 1875; that on the 18th day of March, 1880, John M. Roberts and D. R. Poland by deed conveyed all their right, title, and interest in and to said Poland.

Hamilton mining claims to Charles W. Partridge and others;
207 that said Charles W. Partridge and others on the first day of December, 1880, conveyed the Poland-Hamilton mining claims to one Edward W. Russell; that said Russell on the 5th day of October, 1882, conveyed an undivided one-half interest in and to Poland and Hamilton mining claims to Charles C. Lane and John Howell. On the 25th day of October, 1882, by deed, Edward W. Russell conveyed all his right, title, and interest in and to said mining claims to one Marcellus E. Collins.

On the 25th of October, 1883, said Collins executed a mortgage to said John M. Roberts *to* all of his right, title, and interest in and to said mining claims.

On the 14th day of November, 1883, Charles C. Lane conveyed an undivided one-fourth interest in and to said mining claims to Marcellus E. Collins. On the 18th day of November, 1883, John Howell conveyed an undivided one-fourth interest in and to said mining claims to said Collins.

On the 14th day of November, 1883, said Collins conveyed an undivided one-fourth interest in and to said mining claims to one Robert Schofield, and on the 18th day of August, 1884, Collins conveyed an undivided one-fourth interest in and to said mining claims to one B. F. Thompson, who is the plaintiff in this action.

The facts further show that on the 31st of August, 1886, Roberts brought suit in this court for the foreclosure of the mortgage given by Collins on the 25th day of October, 1883. In this suit
208 judgment was rendered on the 15th day of December, 1886, in accordance with the prayer of the complaint in the action. The judgment directed the sale of the mortgaged premises and debarred Schofield and Thompson from asserting any right in and to the mortgaged premises. A sale was had under this judgment and the property bought in by the mortgagor, Roberts, who on September 30th, 1887, obtained a deed from the sheriff, which deed purported to convey all of the Poland and Hamilton mining claims.

On the 20th day of July, 1891—John M. Roberts being then deceased—James R. Lowry, as the administrator of his estate, conveyed all the right, title, and interest which said John M. Roberts had at the time of his death and all the right, title, and interest which his estate may have acquired since his death in and to the Poland and Hamilton mining claims to E. M. Dickey.

The facts further show that Dickey went into possession of said mining claim, and subsequently, on the — day of ——, applied for United States patents on the said Poland and Hamilton mining claims. Patents were actually issued to E. M. Dickey May 1st, 1893, to the Poland, and to the Hamilton June 20th, 1893.

On March 10th, 1892, Dickey conveyed an undivided one-half interest in said mining claims to F. M. Murphy, and on March 2nd, 1894, conveyed an undivided one-half interest to Charles D. Arms. Murphy on July 2nd, 1894, conveyed to D. M. Ferry, Simon J. Murphy, and Charles C. Bowen, defendants herein, an undivided one-half interest in and to said mining claims.

209 On May 4th, 1894, Arms conveyed to E. B. Gage an undivided one-half interest in and to said mining claims, and on May 13th, 1894, Gage conveyed to defendants herein an undivided one-half interest in and to said mining claims.

The testimony shows that on the 23d day of July, 1896, Schofield conveyed an undivided one-fourth interest in and to said mining claims to plaintiff Thompson.

The defendants in their answer plead an estoppel of record in this, to wit, that in the suit of John M. Roberts *vs.* M. E. Collins, Robert Schofield, and B. F. Thompson to foreclose the mortgage given by said M. E. Collins to said Roberts, on the 25th of October, 1883, it was decreed that all the interest of said Collins in said Poland and Hamilton mining claims be foreclosed and sold, and that the interest of Schofield and Thompson in said property be, and was, adjudged to be subject to the lien of said mortgage. The said mining claims and the interest then held and possessed by Collins, Schofield, and Roberts were sold, according to law, to said John M. Roberts, who then and there received a sheriff's certificate of sale, and, the statutory period for redemption having expired without redemption having been made, said Roberts obtained a deed to said property from the sheriff; which deed was duly placed of record in the office of the county recorder.

The answer further sets up by way of defense that if the plaintiff ever had any interest in or title to said mining claims the
210 same was cancelled and annulled by reason of the fact that E. M. Dickey, the grantor of the defendants, made application in the United States Land Office for patents to said mining claims in his own name and obtained patents to the same in his own name, and that no adverse proceedings were had or taken by said Schofield and by said Thompson during the pendency of said application.

The answer further sets up by way of defense that the defendants were *bona fide*, actual, and innocent purchasers of all of said Poland and Hamilton mining claims without notice, actual or constructive, either before or at the time of their said purchase of any claim, legal or equitable, thereto by said plaintiff or any other person.

And by way of further defense the answer sets up that the defendants and their grantors have been in the peaceable and adverse possession of said mining claims under title and color of title, and have used and enjoyed the same and paid taxes thereon since the 30th of September, 1887, and that they have since that time done all assessment-work required upon said mining claims and expended large sums of money in the developing and operation of both, and made improvements thereon and applied for and obtained patents to the same, and sold and disposed of various interests in the same, and in all things acted as though they were, and as a matter of fact claimed to be and were, the absolute and exclusive owners of both of
211 said mining claims, and of which said acts of said defendants and their grantors the plaintiff and his grantor had actual and constructive notice, and not until October 6th, 1896, being the date of the institution of this suit, did plaintiff pretend or claim to have any interest whatsoever in and to either of said mining claims.

Under the last-mentioned plea two questions are presented: First, under the pleadings, what provisions of the statute of limitations are controlling? Second, do the facts show such a peaceable and adverse possession on the part of the defendants and their grantors as that the right of action of the plaintiff is barred under any provision of the statutes invoked by defendants in their answer?

The defendants have pleaded the acts constituting peaceable and adverse possession, and allege that these began more than five years before the commencement of the action and have continued until the date of the institution of the suit, to wit, the sixth day of October, 1896.

Paragraph 2297, Revised Statutes, provides that—

"Every suit to be instituted to recover real property as against any person in peaceable and adverse possession thereof under title or color of title, shall be instituted within three years next after the cause of action shall have accrued and not afterwards."

Paragraph 2298, Revised Statutes, defines the term "title" as used in the preceding section:

"A regular chain of transfer from or under the sovereignty
212 of the soil, and by 'color of title' is meant a consecutive chain of such transfer down to such person in possession without being regular, as if one or more of the memorials or muniments be not registered, or not duly registered or be only in writing, or such like defect, as may not extend to or include the want of intrinsic fairness and honesty." * * *

Paragraph 2299, Revised Statutes, provides:

"Every suit to be instituted to recover real property as against any person having peaceable and adverse possession thereof, cultivating, using, or enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued, and not afterwards."

The succeeding paragraph, to wit, 2300, restricts the peaceable and adverse possession contemplated by paragraph 2299 to one hundred and sixty acres, including the improvements, or the number of acres actually enclosed should the same be less than 160 acres.

I am of opinion that defendants' plea of the statute contains all the facts which, if true, would bar the action under either paragraph 2297, being the three years' statute, or paragraph 2299, being the five years' statute.

Paragraph 2328, Revised Statutes, reads:

"The laws of limitation of this Territory shall not be made available to any person in any suit in any of the courts of this Territory, unless it be specially set forth as a defense in his answer."

This section of the statutes must be construed in the light of paragraph 655 of the Revised Statutes, which reads as follows:

"The pleadings shall consist of a concise statement of the facts constituting the plaintiff's cause of action or the defendant's ground of defense."

213 Therefore to specially set forth as a defense the laws of limitation bearing upon the subject-matter is to state concisely the facts which bring the case within the purview of the statutes. The court, declaring the law, is to determine under what particular provision of the statute of limitations the facts show the action to be barred, if at all.

Considering, then, first, the facts in connection with paragraph 2299, do they show a peaceable and adverse possession for more than five years preceding the commencement of the action?

In the suit of J. M. Roberts *vs.* M. E. Collins, Robert Schofield, and B. F. Thompson to foreclose the mortgage given by Collins to Roberts, the plaintiff in his complaint alleged that Schofield and Thompson claimed some interest, by purchase or otherwise, in and to the mortgaged premises, and further alleged that said interests were acquired by them and each of them after the making and recording of said mortgage and *was* subsequent and subject thereto. Personal service in that action was had upon Thompson and service by publication upon Schofield. The court decreed that the defendants, Collins, Schofield and Thompson, and each of them and all persons claiming or to claim from or under them or either of them be forever barred and foreclosed of and from all equity of redemption and claim in, of, and to said mortgaged premises and every part thereof, to wit, the Poland and Hamilton mining claims, situated in the Big Bug mining district,

214 Yavapai county, Arizona Territory. Under this judgment the property was sold to the mortgagor, Roberts, who obtained a deed from the sheriff on the 30th day of September, 1887. This deed purported to convey all of the Poland and Hamilton mining claims. The testimony of Lowry tends to show that Roberts went into possession of the mining claims under his deed, and during his lifetime remained in the exclusive possession of the same and claimed to be the absolute owner of the same.

Roberts having died in the year 1890, James R. Lowry, as administrator of his estate and under an order of the probate court, sold the property to E. M. Dickey. The deed from Lowry to Dickey purported to grant all the right, title, and interest which said John M. Roberts had at the time of his death and all the right, title, and interest which his estate may have acquired since his death in and to the Poland and Hamilton mining claims, and described the property as being "all the Poland and Hamilton mining claims," etc., etc.

I construe the latter deed in its obvious sense, to wit, that the right, title, and interest intended to be conveyed was the whole of the Poland and Hamilton mining claims.

This deed was duly recorded on the 20th of July, 1891, in the office of the county recorder of Yavapai county, and Dickey, the grantee, went into exclusive possession of the claims at once, did the assessment-work, and while he remained the owner thereof expended considerable sums in the improvement of the claims.

215 On December 14th, 1891, Dickey made a relocation in his own name of the Poland mining claim. In 1892 Dickey made

application in the United States Land Office for a patent to the Poland and Hamilton mining claims. On March 10th, 1892, Dickey conveyed an undivided one-half interest in the said claims to F. M. Murphy. On March 2nd, 1894, he conveyed another undivided one-half interest in said claims to Charles D. Arms.

Patents were issued to Dickey May 1st, 1893, to the Poland, and June 20th, 1893, to the Hamilton mining claims.

The grantees of Dickey since the date of the respective conveyances have continued in the exclusive possession of the mines, and have expended large sums in the working and development of the same.

Whether or not Roberts can be said to have held possession of the claims adversely to the plaintiff and his grantor, Schofield, it is evident from the conduct of Dickey and his grantees that from the time that Dickey went into possession under the deed from Lowry, administrator, they have claimed to be the exclusive owners of the mines. The kind of work done on the claims indicates this. The testimony shows that all the work done has been development work. The property has never been a paying one in the sense that revenues have been derived from the sale or working of the ores. It is improbable that Dickey and his grantees would have expended so large an amount as thirty thousand dollars on purely exploration and development work had they recognized an outstanding
216 title to one-half of the claims, possessed by persons who have not even contributed to the assessment-work.

Then, again, the relocation of part of the property by Dickey in his own name is equivalent to a declaration of exclusive ownership, and the application for patents in his own name is another. His conveyance of an undivided one-half interest to Murphy and his subsequent conveyance of another one-half interest to Gage, both conveyances being for a valuable consideration, is still more significant.

Then, again, it is to be remembered that neither Schofield nor Thompson since 1886 have even been upon the property or by any act asserted any claim to the property until 1896. The testimony shows in 1884 or '85 Collins, Schofield, and Thompson had a mill on or near the property, and that they attempted to work the property and mill the ores in this mill; that this attempt was a failure, and they soon after abandoned the work on the property and removed the mill to another section, distant from the mines. So far as the testimony goes, Schofield and Thompson have never since that date been upon the property themselves or by their representatives.

No serious attempt was made by plaintiff upon the trial to negative these facts, but he relied almost wholly upon the proposition that Dickey was a cotenant with Schofield and Thompson, and therefore his possession and that of his grantees was not and could not have been adverse as to them; that the possession of one
217 tenant in common is the possession of all the cotenants, and this continues until actual ouster.

The most instructive and, upon the whole, the most satisfactory

exposition of the law upon this subject is found in the case of Unger *vs.* Mooney, 63 Cal., 590.

While reading the whole case is instructive, the law found to govern in that case and which is applicable to this is stated with singular clearness and accuracy in the syllabus. We quote from this as follows:

"The possession of one tenant in common is the possession of his cotenant. There is no element of hostility in such a possession. An actual adverse holding will not operate as an ouster and set the statute of limitations in motion until the tenant out of possession has notice of such holding; but if the hostile character of the possession is so openly manifested that his observation as a man reasonably careful of his interests would be sufficient to discover it, he will be deemed to have notice. Thus where one of two tenants in common conveys to a third person by deed, purporting to convey the whole land, and the deed is recorded by the grantee, who enters under it, such entry is hostile in its nature, and the mere fact of possession by a stranger is enough to put him on inquiry and charge him with notice. So the making of valuable improvements, paying the taxes upon the land, and receiving the rents and profits without accounting or offering to account are circumstances indicating an adverse holding, and their effect upon the cotenant is the same as if notice were directly communicated to him. The means of knowledge being furnished by the open and notorious character of the possession, he is chargeable with actual notice."

To the same effect is Freeman on Cotenancy, section —, which reads as follows:

218 "A conveyance by one cotenant purporting to convey an estate in severalty cannot operate to the prejudice of another. This is true only so far as the immediate effect of such conveyance as a transfer of title is concerned. It does not follow that no rights can grow out of it, nor that it is, even as against the other cotenants, mere waste paper for all purposes. Such a conveyance constitutes color or title. The entry of the grantee made under the deed and claiming an interest coextensive with that with which the deed purports to deal is an entry under color of title. The cotenants are therefore bound to take notice of the deed and of the entry made under it, and to take such steps as may be required to enforce a recognition of their legal rights. Should they fail to do so within the time prescribed by the statute of limitations, their rights will be no longer susceptible of enforcement, and their interests, by operation of that statute, will vest in the party in possession under the deed."

If we assume that Roberts, notwithstanding the foreclosure decree and his sheriff's deed and his entry under the same, was still a cotenant with Schofield and Thompson and did not hold adversely to them, the deed from Lowry, Roberts' administrator, to E. M. Dickey, purporting to convey the whole title to the Poland and Hamilton mining claims, when recorded was notice to Schofield and Thompson that Dickey's entry was hostile in its nature, put them upon inquiry, and was notice to them that his holding was coextensive with the deed. Under the authority of Unger *vs.* Mooney, Dickey's

entry upon the mines under the Roberts deed operated as a disseizin and ouster.

Likewise the relocation of the Poland claim by Dickey was an act evidencing an adverse holding and a holding hostile to his cotenants.

The application for patents to the mines, the transfer to
219 Murphy and Gage, were all acts equivalent to a disseisin and ouster.

The case of The Mining Company *vs.* Taylor, 100 U. S., page 37, and relied upon by plaintiff, is not in point. In that case there was no act showing a hostile holding on the part of the cotenants, and no ouster or disseizin, except after the cotenants had conveyed to a foreign corporation, which could not, under the statutes of Nevada, where the suit was instituted, set up the statute of limitations as a defense.

I am of opinion that the facts in this case bar plaintiff's right of recovery under paragraph 2299, and I am likewise of the opinion that plaintiff's action is barred under paragraph 2297.

The patent to the Poland mining claim is dated May 1st, 1893, and the patent to the Hamilton mining claim is dated June 20th, 1893. This suit was instituted October 6th, 1896. The patent and the transfers to defendants from the patentee show a chain of title from and under the sovereignty of the soil.

The rule that a patent that has been applied for and obtained by one cotenant cannot affect the equitable rights of another cotenant is not of universal application. It is true that where, from the relation of the parties, it can be inferred that the patentee was acting, not alone for himself, but for his cotenant as well, a court of equity will decree that in acquiring his patent he acted for the benefit of his cotenant.

If there had been a previous recognition by the patentee of the
220 rights of his cotenant, or if he took undue advantage of his cotenant, or where circumstances existed that showed a relation of trust and confidence between the patentee and the cotenant, the patent would enure to the benefit of all the owners of the property; but if no such relation existed, if the claim of the patentee had been adverse to his cotenant, and if he, at the time of his application and prior thereto, had constantly asserted his right to the whole of the property, and had not done or said anything to cause his cotenant to believe that he was acting in his behalf in applying for the patent, and abused no confidence in taking the whole title to himself, it is very doubtful if the rule forbidding a cotenant from acquiring an outstanding title for his own benefit would apply.

Taber *vs.* Sullivan, 20 Pac., 440.

However that may be, there can be no doubt but that where a patentee who has held adversely to a cotenant and co-owner in and to the property, who has constantly asserted his right to the whole of the property, and whose acts and conduct did not evidence any understanding, expressed or implied, that in obtaining a patent he was acting for his cotenant, he does not become such a trustee of the

legal title for the use and benefit of the cotenant as that he may not take advantage of the statute of limitations.

There is no single fact connected with the obtaining of the patent by Dickey which evidences any other purpose or intent on
221 his part than that of taking and retaining the whole title to himself. It was a hostile act, so far as the plaintiff and his grantor are concerned, of the most aggressive kind and character, and the possession of himself and grantees since the date of the issuance of the patents *have* been and *have* continued to be a peaceable and adverse — for more than three years prior to the institution of this action.

I find, therefore, that the defendants' plea of the statute of limitations is well taken.

There is another question of great interest which I have considered somewhat, and that is whether or not the judgment and decree in the case of Roberts *vs.* Collins operates as an estoppel of record against the plaintiff. As, in my judgment, the statute of limitations disposes of this case, I do not deem it necessary or essential to state my conclusion and decision of this question.

For the same reason I do not care to express any positive view upon the question as to whether the patents in this case and the failure of the plaintiff and his grantor to adverse Dickey's application for the same concludes them from asserting any interest in and to the property claimed. There is some authority to sustain defendants' contention in this regard, particularly the case of—

Taber *vs.* Sullivan, *supra*.

222 But the law is hardly sufficiently well settled for the court to state with certainty whether the facts as shown in this case preclude plaintiff from asserting title, notwithstanding the defendants hold patents from the United States to the property in controversy.

Judgment will be entered for the defendants.

RICHARD E. SLOAN, *Judge*.

223 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

B. F. THOMPSON, Plaintiff and Appellant,
vs.
D. M. FERRY, SIMON J. MURPHY, and CHARLES C. BOWEN, Defendants and Appellees.

Cost Bond on Appeal.

Whereas in the above-entitled cause, pending in the said district court of the fourth judicial district of the Territory of Arizona in and for the county of Yavapai, and on the 21st day of December, 1897, the same being one of the days of the regular November, 1897, term of said court, the said defendants, D. M. Ferry, Simon J. Murphy, and Charles C. Bowen, secured judgment against the above-named plaintiff, B. F. Thompson, that he take nothing by his com-

plaint, but that said defendant- take judgment against said plaintiff as in their cross-complaint prayed for, and costs of suit, from which judgment the said B. F. Thompson has by proper notice taken an appeal to the supreme court of the said Territory of Arizona:

Now, therefore, we, the said B. F. Thompson, as principal, and Hugo Richard and C. A. Peter, as sureties, acknowledge ourselves bound to pay to the said D. M. Ferry, Simon J. Murphy, Charles C. Bowen the sum of two hundred and fifty dollars ($250.00),
224 conditioned that the said B. F. Thompson, appellant, shall prosecute his appeal with effect and shall pay all costs which have accrued in the court below or which may accrue in the said appellate court.

Witness our hands this 18th day of May, 1898.

B. F. THOMPSON,
By MORRISON & MORRISON,
His Attorneys-in-fact.
HUGO RICHARDS.
C. A. PETER.

TERRITORY OF ARIZONA, }
County of Yavapai, } *ss:*

Hugo Richards and C. A. Peter, being first duly sworn, each for himself and not one for the other says that he is a resident householder or freeholder in the said county and Territory, and that he is worth the amount for which he has become surety on the foregoing bond over and above his just debts and liabilities and exclusive of property exempt from execution or forced sale.

HUGO RICHARDS.
C. A. PETER.

Subscribed and sworn to before me on this the 13th day of June, 1898.

MOSES B. HAZELTON,
[SEAL.] *Notary Public.*

My commission expires July 24th, 1899.

I have fixed the probable amount of the costs of the above-entitled suit, both in said district court and the supreme court of Arizona, at the sum of one hundred and twenty-five dollars, this 17th day of May, 1898.

J. M. WATTS,
Clerk District Court, Fourth Judicial District, for Yavapai County, Arizona.

I hereby approve the foregoing bond, this 14th day of June, 1898.

J. M. WATTS,
Clerk District Court, Fourth Judicial District, for Yavapai County, Arizona.

Endorsed: Filed at 2 o'clock p. m. June 14th, 1898. J. M. Watts, clerk.

15—144

225 TERRITORY OF ARIZONA, } ss:
County of Yavapai, }

I, J. M. Watts, clerk of the district court in and for Yavapai county, do hereby certify the foregoing to be a true copy of the bond on appeal filed in the case of B. F. Thompson *vs.* D. M. Ferry *et al.*, No. 2618, as the same appears on file in my office.

Witness my hand and the seal of said court this 7th day of January, A. D. 1899.

[District Court Seal.]

J. M. WATTS, *Clerk.*

226 TERRITORY OF ARIZONA, } ss:
County of Yavapai, }

I, J. M. Watts, clerk of the district court of the fourth judicial district of the Territory of Arizona in and for the county of Yavapai, do hereby certify that the foregoing is a full, true, and complete transcript of the minute record of the proceedings had on the trial of the cause, and the hereto attached are the original papers, to wit, judgment-roll, together with the findings of fact, the motion for a new trial, and the reporter's transcript in the case of B. F. Thompson, plaintiff, *vs.* D. M. Ferry, Simon J. Murphy, and Charles C. Bowen, defendants, No. 2618, and of the whole thereof.

Witness my hand and the seal of said court this 7th day of January, A. D. 1899.

[District Court Seal.]

J. M. WATTS, *Clerk.*

227 In the Supreme Court of the Territory of Arizona.

B. F. THOMPSON, Appellant,
vs.
SIMON J. MURPHY, C. C. BOWEN, and D. M. Ferry, Appellees.

Assignments of Error as Contained in Appellant's Brief Filed in the Supreme Court of Arizona. Filed January 24, 1899. Lloyd Johnston, Clerk.

Assignments of Error.

Assignment first. The court erred in finding that the deed from Lowry, administrator, to E. M. Dickey, purporting to convey the whole of the title to the Poland and Hamilton mining claims, when recorded, was notice to Schofield and Thompson that Dickey's entry was hostile to them, put them on their inquiry, and was notice to them that his holding was coextensive with his deed, because the Lowry deed conveyed only such interest as the deceased Roberts had at the time of his death or as had been acquired since his death, and that interest was only an undivided one-half interest, acquired under the mortgage from Collins and the subsequent foreclosure of said mortgage and the judgment and decree therein de-

claring a lien and right to satisfaction of the same out of the "mortgaged premises," which was an undivided one-half interest of said mining claims.

Assignment second. The court erred in finding that the relocation of the Poland claim by Dickey was an act evidencing an adverse holding and a holding hostile to his cotenants, because—

228 First. The claim was not open to location December 14, 1891, the assessment-work for 1890 having been performed. (See Lowry's testimony, page —, statement of facts.)

Second. This location was only an amended location, fixing more accurately the boundaries of the claim, and could not annul original location.

Third. The Revised Statutes of the United States, par. 2324, provides the method by which co-owners of mining claims can secure the title of their co-owner who fails "to contribute his proportion of the expenditures" required for annual assessment-work for any year.

Assignment third. The court erred in finding the application for patents to the mines equivalent to a disseisin and ouster, because Thompson and Schofield were the co-owners with Dickey, the applicant for the patent, and Dickey was acting as trustee for them in so doing to the extent of their one-half undivided interest in the mines, and Dickey had never advertised them out under par. 2324, U. S. R. S.

Assignment fourth. The court erred in finding that the facts in the case bar plaintiff's right to recover under paragraphs 2397 and 2299 of the Revised Statutes of Arizona, 1887, because—

First. The facts do not show that there was for either three or five years "peaceable and adverse possession of the mines by an

229 actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another" (Par. 2304, R. S. 1887).

Second. Paragraph 2308, R. S. 1887, says "the words 'real property,' wherever used in this act, *is* to be taken to mean mines and mining claims;" and paragraph 2304, R. S. 1887, defining adverse possession, speaks only of "lands." Therefore, under this statute, adverse possession does not apply to mines and mining claims.

Third. Adverse possession as contemplated by paragraph 2300, R. S. 1887, applies to enclosed land if it is less than 160 acres; and the court will take judicial notice that two mining claims contain less than 160 acres, and it appears that claims were not enclosed.

Assignment fifth. The court erred in holding that the defendants' plea of the statute of limitations was well taked, because—

First. The facts do not sustain the finding.

Second. The facts show that the plaintiff and defendants and all of their predecessors in interest were co-owners of the Poland and Hamilton mining claims under the original location notices, and no adverse possession had ever begun as against Thompson and Schofield, as the assessment was always performed; and,

Third. The only way to extinguish the title of a co-owner of a

mining claim where the assessment-work is performed is by
230 advertising out the one who fails to contribute his proportion of the expenditure in accordance with paragraph 2324, R. S. U. S.

Fourth. The statute of limitations cannot be successfully pleaded against a co-owner of a mining claim nor adverse possession established under the facts in this case.

Assignment sixth. The court erred in rendering judgment for the defendants for the reasons:

First. That such judgment is contrary to the law.

Second. That it is not supported by the law and is contrary to the facts in the case.

Third. That the evidence and law of the case show that the defendants' grantor, E. M. Dickey, was a cotenant or co-owner with Thompson, the plaintiff, and his grantor, Schofield, from the time of his purchase from Lowry, administrator, in said Poland and Hamilton mining claims.

Fourth. That neither Dickey or any of his grantors were ever in the open, notorious, exclusive, peaceable, and adverse possession of said claims, but were at all times co-owners with Thompson, the plaintiff, in said mining claims and were never at any time entitled to the absolute and exclusive possession and ownership of said claims.

Fifth. That said Dickey and his grantors were never continuously and uninterruptedly in the absolute, exclusive, and peaceable
231 possession of said claims, adverse and hostile to all the world, and particularly to plaintiff Thompson.

Sixth. That the evidence in the case shows that the action herein, at the time of its institution, to wit, October 6, 1896, was not barred by the statute of limitations, section 2299 of Revised Statutes of Arizona, 1887.

Seventh. That the judgment is against the weight of the evidence, which shows overwhelmingly that the plaintiff, at the date of the commencement of this action, was a co-owner with the defendants in and to an undivided one-half interest in said mining claims, and no adverse possession ever had or could have been established against plaintiff or his predecessors in interest.

Assignment seventh. The court erred in refusing to grant the motion for a new trial for the reasons set forth in said motion and each and every of the assignments of error hereinbefore set forth, with a like effect as if the same were written at length therein.

232 In the Supreme Court of the Territory of Arizona, January Term, 1899.

B. F. THOMPSON, Appellant, *vs.* D. M. FERRY, SIMON J. MURPHY, and Charles C. Bowen, Appellees.	No. 663. Minute Entry, January 10th, 1899.

It is ordered that the hearing of this cause be set for February 1st, 1899.

B. F. THOMPSON, Appellant,
vs.
D. M. FERRY, SIMON J. MURPHY, and Chas. C. Bowen, Appellees.
No. 663. Minute Entry, February 1st, 1899.

This cause, coming on for hearing, was argued by Mr. Morrison, counsel for appellant, and Mr. Johnston, counsel for appellee-, and cause ordered submitted.

B. F. THOMPSON, Appellant,
vs.
D. M. FERRY, SIMON J. MURPHY, and Charles C. Bowen, Appellees.
No. 663. Order Affirming Judgment, March 15th, 1899.

This cause having been heretofore submitted and by the court taken under consideration, and the court having considered
233 the same and being fully advised in the premises:
It is ordered that the judgment of the district court be, and the same is hereby, affirmed.

In the Supreme Court of the Territory of Arizona, January Term, 1899.

B. F. THOMPSON, Appellant,
vs.
D. M. FERRY, SIMON J. MURPHY, and Charles C. Bowen, Appellees.
No. 663. Opinion. Filed March 15th, 1899. Lloyd Johnston, Clerk.

Appeal from the district court, Yavapai county—R. E. Sloan, judge.

Morrison and Morrison, attorneys for appellant.
T. W. Johnston, attorney for appellees.

Opinion by Street, C. J.

Statement.

On the 25th day of October, 1883, M. E. Collins was the owner of an undivided one-half interest in the Poland mining claim and an undivided one-half interest in the Hamilton mining claim, both situated in Big Bug mining district, Yavapai county, Arizona. On that day he executed a mortgage to John M. Roberts to secure
234 a debt to Roberts. At that time Charles C. Lane and John Howell were the owners of the other half interests, each owning an undivided one-fourth. On the 14th of November, 1883, Lane conveyed by deed his one-fourth interest in the two claims to Collins, and on the same date Collins conveyed that undivided one-fourth to Robert Schofield. On November 16th, 1883, John Howell conveyed his undivided one-fourth interest to M. E. Collins, and on August 16th, 1884, Collins conveyed an undivided one-fourth interest to B. F. Thompson, appellant herein.

On August 21st, 1886, John Roberts, mortgagee, brought suit in the district court of the fourth judicial district in and for Yavapai county against M. E. Collins for the collection of the debt and a foreclosure of the mortgage. Robert Schofield and B. F. Thompson were made parties defendant. The allegation in the complaint as to defendants Schofield and Thompson was "that they claimed some interest, by purchase or otherwise, in and to said mortgaged premises; that whatever of interest or claim they or either of them may have in or to said mortgaged premises was acquired by them and each of them after the making and recording of said mortgage, as aforesaid, and is subsequent and subject thereto." The prayer of the complaint with reference to those two defendants was that the interest or claim of each of them to said mortgaged premises be decreed subject to said mortgage, and that said defendants and each of them and all persons claiming under them or either of them
235 be barred and foreclosed of all right or claim of equity of redemption.

The record fails to show the nature of the service of summons upon the defendants Schofield and Thompson, but the unchallenged statement in the brief is that Schofield was personally served with summons and complaint and Thompson by publication, and that copies of each were mailed to him. The judgment recites that it appeared to the court that the defendants M. E. Collins, Robert Schofield, and B. F. Thompson and each of them was regularly served with summons, and that they and each of them had failed to appear, but made default, and that the default of said defendants and each of them had been regularly entered. Said judgment was rendered on the 15th day of December, 1886, and, after adjudging in favor of plaintiff Roberts and against the defendant Collins as to the debt, it decreed that all and singular the mortgaged premises mentioned in plaintiff's complaint be sold at public auction by the sheriff of Yavapai county after giving the proper notice, and that the sheriff, after the time allowed by law for redemption has expired, execute a deed to the purchaser or purchasers of the mortgaged premises on the said sale. It further decreed "that the defendants Collins, Schofield, and Thompson and each of them and all persons claiming or to claim from or under them or either of them and all persons having liens subsequent to the said mortgage by judgment or decree upon the lands described in said mortgage be forever barred and foreclosed of and from all equity of redemption and
236 claim in, of, and to said mortgaged premises and every part thereof from and after the delivery of the sheriff's deed."

The premises described in the decree were the Poland and Hamilton mining claims, by metes and bounds. The mortgagee, John M. Roberts, became the purchaser at the sheriff's sale on the 17th of March, 1887, and received a certificate of sale describing the Poland and Hamilton mining claims by metes and bounds, and on the 30th day of September, 1887, received a sheriff's deed therefor. The Poland and Hamilton mining claims at that time were unpatented mining locations. On the 20th of July, 1891, James R. Lowry, as administrator of the estate of John M. Roberts, deceased, conveyed

all the right, title, and interest which said John M. Roberts had at the time of his death, and all right, title, and interest which his estate may have acquired since his death in and to the Poland and Hamilton mining claims to E. M. Dickey.

Thereafter, on December 14th, 1891, Dickey made a relocation of the Poland and Hamilton mining claims in his own name. In 1892 he made applicatien to the United States land office for a patent to each of those claims in his own name, and on the first day of May, 1893, received a patent to the Poland claim, and on the 20th day of June, 1893, received a patent to the Hamilton claim. After Dickey made application for patent, he conveyed, March 10th, 1892, an undivided one-half interest in said mining claims to F. M. Murphy.

The transfers of title after patent issued to Dickey are as
237 follows: March 2nd, 1894, Dickey to Charles D. Arms, an undivided one-half interest; July 2nd, 1894, F. M. Murphy to D. M. Ferry, Simon J. Murphy, and Charles C. Bowen, and undivided one-half interest; on May 4th, 1895, Charles D. Arms to E. B. Gage, an undivided one-half interest; on May 13th, 1894, E. B. Gage to D. M. Ferry, Simon J. Murphy, and C. C. Bowen, an undivided one-half interest (said Murphy, Ferry, and Bowen being the appellees herein), and on July 23rd, 1896, Robert Schofield conveyed to appellant, B. F. Thompson, of the interest in the Poland and Hamilton mining claims which he had acquired by deed from Collins on the 14th of November, 1883. On October 6th, 1896, appellant, B. F. Thompson, brought action against appellees, alleging his ownership in and to an undivided one-half interest in the Poland and Hamilton mining claims, praying that defendants Ferry, Murphy, and Bowen be declared trustees for plaintiff of plaintiff's one-half interest, and that they be decreed to convey the same to him.

Defendants answered and plead (1) an estoppel of record by virtue of the foreclosure suit of Roberts against Collins, Schofield, and Thompson; (2) that whatever interest plaintiff or his predecessors may have theretofore had, the same was cancelled and annulled by the application for an issuance of patent to Dickey; (3) that defendants were *bona fide* actual and innocent purchasers without notice, actual or constructive, of any claim, legal or equitable, by plaintiff;
(4) that defendants and their grantors have been in the peace-
238 able and adverse possession of said mining claims under title or color of title since September 30th, 1897; alleged possession, development work, and improvements, of which plaintiff and his grantors had actual and constructive notice.

The district court found for the defendants; that defendants for five years before suit filed—October 6th, 1896—had been in open, notorious, exclusive, peaceable, and adverse possession of both the Poland and Hamilton mining claims, and plaintiff was barred by the statute of limitations; from which judgment plaintiff appealed.

Opinion.

Whatever may have been the condition of the legal title before Dickey received a patent, after the United States patent was issued to Dickey the legal title was in Dickey and his assigns, and at the time this action was brought the legal title was in appellees. This condition of the title was well recognized by the respective parties, and plaintiff sues in equity to recover his lost legal title to the undivided one-half interest, which was absorbed by Dickey in the issuance of the patent.

It is well settled that where a patentee has taken unto himself a title from the Government which, before patent issued, rested in himself and others, as tenants in common by virtue of location interests, the patentee holds the title in trust for the true owners, and that a bill in equity will lie to enforce such a trust.

239 Johnson *vs.* Towsley, 13 Wall., 72.
Moore *vs.* Robbins, 96 U. S., 530.
Marquez *vs.* Frisbie, 101 U. S., 473.
Rector *vs.* Gibbons, 111 U. S., 276.
Turner *vs.* Sawyer, 150 U. S., 578; and
Monroe Cattle Co. *vs.* Becker, 147 U. S., 47.

Where, from the relation of the parties, it can be inferred that the patentee was acting not alone for himself, but for his cotenant as well, a court of equity will decree that in acquiring his patent he acted for the benefit of the cotenants. If there had been a previous recognition by the patentee of the rights of his cotenants, or if he took undue advantage of his cotenants, or where relations of trust and confidence between the patentee and his cotenant existed, the patnet would enure to the benefit of all of the owners of the property. If no such trust relation existed, if the claim of the patentee has ever been adverse to his cotenant, and if at the time of his application and prior thereto he had constantly asserted his right to the whole of the property; if the cotenant was aware of the application for patent by the adverse holder in his own name alone and was aware of the assertion of adverse rights, and the patentee had not done or said anything to cause his cotenant to believe that he was acting in his behalf as well as in his own, and had quietly permitted patentee to obtain the legal title, it is doubtful if a court of equity would interfere.

The statute of Arizona on limitations of actions for land, relied upon by appellee, is as follows, to wit:

240 Par. (2297). "Every suit to be instituted to recover real property as against any person in peaceable and adverse possession thereof, under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards."

Par. (2298). "By the term title is meant a regular chain of transfer from or under the sovereignty of the soil, and by color of title is meant a consecutive chain of transfer down to such person in

possession without being regular, as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing." * * *

Par. (2299). "Every suit to be instituted to recover real property as against any person having peaceable and adverse possession thereof, cultivating, using, or enjoying the same, and paying taxes thereon, if any, and claim under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued, and not afterwards."

It is not pretended by appellant that he or his predecessors had been operating the mines or either of them, or doing any work thereon, by way of annual expenditure or otherwise, which makes the physical index of possession, but he relied wholly upon his legal rights as tenant in common with appellees and their predecessors in interest. He treats the sheriff's deed, the administrator's deed, and the relocation notice, as well as the patent, as instruments in
241 harmony with his rights and not adverse to them.

Freeman, in his work on Cotenancy, says: "A conveyance by one cotenant, purporting to convey an estate in severalty, cannot operate to the prejudice of the other. This is true only so far as the immediate effect of such conveyance as a transfer of title is concerned. It does not follow that no rights can grow out of it, nor that it is, even as against the other cotenants, mere waste paper for all purposes. Such a conveyance constitutes color of title. The entry of the grantee made under the deed, and claiming an interest co-extensive with that with which the deed purports to deal, is an entry under color of title. The cotenants are therefore bound to take notice of the deed and of the entry made under it, and to take such steps as may be required to enforce a recognition of their legal rights. Should they fail to do so within the time prescribed by the statute of limitations, their rights will be no longer susceptible of enforcement, and their interests by operation of that statute will vest in the party in possession under the deed."

In the syllabus of the case of Unger *vs.* Mooney, 63 Cal., 586, there is a correct summary of the matter as follows, to wit: "The possession of one tenant in common is the possession of his cotenant. There is no element of hostility in such a possession. An actual adverse holding will not operate as an ouster and set the statute of limitations in motion until the tenant out of possession has notice of such holding. But if the hostile character
242 of the possession is so openly manifested that his observation as a man reasonably careful of his interests would be sufficient to discover it, he will be deemed to have notice. Thus where one of the two tenants in common conveys to a third person by deed purporting to convey the whole land, and the deed is recorded by the grantee, who enters under it, such entry is hostile in its nature, and the mere fact of possession by a stranger is enough to put him on inquiry and charge him with notice. So the making of valuable improvements, paying the taxes upon the land, and receiving the rents and profits without accounting or offering to account are circumstances indicating an adverse holding, and their effect upon the

cotenant is the same as if notice were directly communicated to him. The means of knowledge being furnished by the open and notorious character of the possession, he is chargeable with the actual notice."

The assignments of error relate principally to the finding of the court upon the statute of limitations, in which we think the district court was logically correct in its conclusions. How stands the case of the plaintiff under the equitable doctrine of laches? Let us review the facts. In 1884 and 1885 the then owners of the properties—Collins, Schofield, and Thompson—placed a mill on one of the mines or on land adjacent thereto and commenced development work for the purpose of immediate revenues. The proposition was a
243 flat failure. Collins abandoned the idea of pursuing his interests in the claims further and allowed foreclosure proceedings of his mortgage. He went away and left Schofield and Thompson in the vicinity of the mines. Schofield moved the mill away, and nothing from that day until the present has been done or attempted to be done on the mines by way of annual expenditures, development work, or work for revenue by either Schofield or Thompson. They were aware of the mortgage foreclosure proceedings by Roberts, and neither of them paid any attention to the suit or to the allegation in Roberts' complaint against them that they claimed an interest in the mines, nor opposed his prayer that their interests be foreclosed. After the execution of the sheriff's deed, Roberts alone performed the annual expenditure upon the mines up until the time of his death, and neither Scofield nor Thompson made any efforts to do anything with the mines or give any expressions of their interests in them.

After Roberts' death there was administration proceedings and an administrator's deed, which, engaging in legal presumptions, we must conclude was after legal notice given to all parties interested in the mines. Dickey obtained his deed and went into manual possession of the mines by doing work thereon sufficient to keep the locations alive. In 1891 he made a relocation of the mines. It is claimed by appellant that those relocations were made for the purpose of correcting descriptions, but they were made in Dickey's name alone, without any word of protest from either Scofield
244 or Thompson. In 1892 Dickey made application for patent in the United States land office, and, engaging in legal presumptions, we must conclude that, following the application, notices were posted as in such cases required. There is no showing in the record that Thompson and Scofield were not aware of any of these proceedings.

A patent was issued in 1893 to Dickey, and following the issuing of the patent there were transfers as follows: One-half interest by Dickey to Arms, one-half interest by F. M. Murphy to appellees, one-half interest by Arms to Gage, and one-half interest by Gage to appellees, and during all of this time neither appellant nor Scofield made any protest or made any claim to any interest in the mines, and the record is still silent about their being unaware of the transfers. Under each of the transfers of title the grantees went into possession and operated the mines. They have permitted the

present owners of the title to expend thirty thousand dollars in improvements and development work; they permitted appellees and their assigns to do development work upon the mines to the extent of running over 2,000 feet of tunnels, and still the record is silent as to Scofield and Thompson being unaware of the work going on, while it is asserted by appellees that Thompson and Scofield were aware of every step in the transfer of titles. It is asserted by appellees that they were fully cognizant of the development
245 work done upon the mines, the running of the tunnels, and the expenditure of the vast sums of money to put the mines in working shape, yet from 1886 to 1896 they have not been heard to make a claim to any interest in the mines.

Under the equitable doctrine of laches, Thompson is estopped from now asserting that he is a cotenant, and that appellees are trustees of the title for his use.

The judgment of the district court is affirmed.

WEBSTER STREET,
Chief Justice.

We concur.

GEO. R. DAVIS.
FLETCHER M. DOAN,
Associate Justices.

246 In the Supreme Court of the Territory of Arizona, January Term, 1899.

B. F. THOMPSON, Appellant, *vs.* D. M. FERRY, SIMON J. MURPHY, C. C. Bowen, Appellees.	No. 663. Motion for Rehearing. Service of within Acknowledged this 29th Day of March, 1899. T. W. Johnston, Attorney for Appellees. Filed March 30th, 1899. Lloyd Johnston, Clerk.

Motion for Rehearing.

Comes now the above-named appellant, Thompson, and moves the court for a rehearing in the above-entitled cause, in which judgment was rendered by this court against appellant and in favor of appellees, affirming the decision of the lower court, which said judgment of affirmance was rendered and the opinion of the court herein filed in this court on the 15th day of March, 1899.

The grounds upon which appellant asks for a rehearing are as follows, to wit:

First. That the court erred in finding that the plea of the statute of limitations was a good defense, and that said statute had run at the time that this suit was begun in the district court.

Appellant insists that the statute of limitations of the Territory of Arizona is not applicable where the property involved is a mining claim, for the reason that the Revised Statutes of the United
247 States, para. 2324, provides the method by which co-owners in mining claims can acquire the title of their co-owner who

"fail- to contribute his proportion of the expenditures" required for annual assessment-work for any year.

The evidence in this case shows that the assessment-work was performed during each and every year from the time that Roberts entered into possession under the sheriff's deed in the foreclosure proceedings down to the date of the issuance of United States patent to Dickey. There was no attempt whatever to advertise out Thompson or Schofield for failure to pay their shares of annual assessment-work.

Neither the sheriff's deed nor the administrator's deed nor the amended location notice filed by Dickey on one of the claim- was of such an adverse character as to start the running of the statute of limitations.

Roberts and Dickey, as cotenants of and with Thompson and Schofield, had a perfect right under the law to go into possession and work and develop and make any improvements that they might please upon the mining claims, and would not be thereby in any way accountable to Schofield and Thompson for any profits that they might derive from the estraction of ores from the mine, and therefore the possession of the defendant appellants was not in any way adverse and hostile to the title of Thompson and Schofield in and to the undivided one-half interest in the properties.

248 The case of Unger *vs.* Mooney, 63 Cal., 586, is not applicable. The land in question in that case was a town lot in the city of San Francisco, and in that case the owners of the land gave a deed to all of the property, under which title was claimed and possession taken. In the case at bar Collins, who at one time owned all of the title to the Poland and Hamilton mining claims, never gave a deed to Roberts to any portion of said property, nor did he ever give a deed to any of his successors in interest. It is only by virtue of foreclosure proceedings that Roberts can or does claim any title whatever. There is no question but that the sheriff's deed was a nullity, except as to an undivided one-half interest, and the persons claiming under the same take title subject to all the infirmities of the said sheriff's deed, and in this particular case subject to the fact that there was no judgment whatever upon which it could pass title to more than an undivided one-half interest.

Thompson and Schofield had a perfect right to rely upon their title because it has been in them at all times since it was acquired, because the judgment in foreclosure simply estopped them from asserting any right or title in and to the "mortgaged premises," and no one will question the fact that the mortgaged premises were an undivided one-half interest only in and to the said mining claims.

Statement made by the court that Dickey made a relocation of the claims is not sustained by the record, and even if he filed

249 a relocation notice it had no force or virtue, because a relocation can only be made when the mining claim has been abandoned or where there has been a failure to perform annual assessment-work during the year previous.

An examination of the record shows that the defendants did not rely upon this relocation to establish their title, as they introduced

evidence as to chain of title beginning with the original location of the Poland and Hamilton mining claims, made in the early, 80's, and from that on down.

Second.

The court erred in holding that under the equitable doctrine of laches the plaintiff Thompson was barred, for the reason that the facts in this case do not establish this doctrine at all, and it is in no way applicable. The court says:

"That because Schofield and Thompson, from the time that they moved their mill away on, did not attempt in any way to perform annual assessment-work, nor did any development work, nor attempted to get any revenue from the mines," and insists that this is evidence that sustains this equitable doctrine of laches.

There is no law that can be found on the subject of mining claims and mines and the title thereof which requires any of these things to be done. The annual assessment-work was performed by the cotenants of Thompson and his predecessors, and the law does not require a cotenant to do the assessment-work nor to contribute to the expenditure incurred in doing the assessment-work, and the
250 law does say that the doing of the assessment-work by one cotenant inures to the benefit of all of the cotenants, and the performance of all the assessment-work by one of the cotenants and the development of the property by one cotenant cannot and does not militate against or tend to destroy the title of the cotenant who does the work.

The United States statutes provides that if one cotenant does not contribute to the performance of the annual assessment-work and the other cotenant does the work, then the latter may acquire the title of the former by "advertising out" and by no other method.

It is true that Schofield and Thompson knew of the foreclosure proceedings, and the court seems to lay great stress upon the fact that neither of them paid any attenton to the suit. Why should they? Their interests were not involved in this action in any way whatever. The complaint and decree of foreclosure and the order of said sale all speak solely of the mortgaged premises. In the mortgaged premises Schofield and Thompson had no interest whatever, and they could make no objection to the court's decreeing that they had no right or interest in or to the mortgaged premises—that is, the undivided one-half interest that Collins owned at the time that he gave the mortgage to Roberts. Schofield and Thompson's interest- were acquired by Collins after the giving of the mortgage and were not in any way involved in the litigation.
251 Roberts by the sheriff's deed became only the cotenant of Schofield and Thompson, and the fact that the annual assessment-work was done by Roberts cannot *fo* to make up facts to sustain this doctrine of equitable laches.

Again, the court says that Dickey made a relocation of the mines in 1891, and further states that appellant claims that the same was made for the purpose of correcting descriptions, and that they were

made in Dickey's own name and without a word therein about Schofield or Thompson, and that these facts go to make up the doctrine of equitable laches.

If this is the case, must a co-owner be constantly going to the county recorder's office, day after day, to search therein and discover whether or not his cotenant is putting on record notices of relocation? Surely the law does not require and such vigilance as this, especially when the annual assessment-work has been done and no valid relocation of the property can be made.

The learned judge in his opinion also gives prominence to the fact that Dickey, in 1892, made application for patent in the U. S. land office, and says: "And, engaging in legal presumptions, we must conclude that following the application notices were posted as in such cases required," and continues that there is no showing of record that Thompson and Schofield were not aware of these proceedings.

252 As appears in our brief herein, the Supreme Court of the United States has held that where parties take title from a common source and where the person making application for patent aserts title under legal proceedings, and both parties claim under the same location notices, that there is no such adverse claim as would require a person to file an adverse — in the land office.

In Turner *vs.* Sawyer, 150 U. S., 578; 37 Co-op., 1189, Justice Brown says:

"Turner did not make a prior valid location of the same lode and made no objections to the boundaries or extent of Sawyer's claim, but asserted that he had acquired Sawyer's title by legal proceedings. The propriety of such a claim was not a question which seems to have been contemplated in requiring the "advertising out" of hostile claims. * * * This we announce as the settled doctrine of this court."

This position is also sustained in Hunt *vs.* Patchen, 35 Fed., 816-820, by the distinguished Sawyer.

We assert that the fact that present owners of the legal title to these claims expended $30,000.00 in improvements in development work, and that they run over 2,000 feet in tunnels thereon, and spent vast sums of money on said properties during the years 1886 and 1896, in no way tends to establish this equitable doctrine of laches, and we again cite, as already pointed out in our brief, the case of Union Cons. Sil. M. Co. *vs.* Taylor, 100 U. S., 37; 25 Co-op., 541, the facts in which are almost identical with those in the case at bar.

253 The facts in said case show that Taylor purchased an undivided interest in a mining claim on the Comstock lode in 1862, and thereafter did no work thereupon for over 12 years, and that in the meantime the defendant company itself and its predecessors were in possession and had expended over $30,000 in improvements; and we again direct the attention of the court to the language used by Justice Strong in deciding this said case, which will be found at page 24 of our brief herein.

Upon the same question we again call your honors' attention to the authorities cited in our brief:

Zeller *vs.* Eckert, 4 How., 295; page 19, brief.

McLaskey *vs.* Barr, 47 Fed., 154–161; page 19, brief.

Third.

That the counsel for appellees of record herein is T. W. Johnston, whose residence is Prescott, Arizona.

Respectfully submitted.

MORRISON & MORRISON,
Attorneys for Appellant.

254 In the Supreme Court of the Territory of Arizona, January Term, 1899.

B. F. THOMPSON, Appellant,
vs.
D. M. FERRY ET AL., Appellees.
} No. 663. Order Denying Motion for Rehearing.

JUNE 2ND, 1899.

In this cause it is ordered that the motion for rehearing filed herein by appellant be, and the same is hereby, denied.

B. F. THOMPSON, Appellant,
vs.
D. M. FERRY ET AL., Appellees.
} No. 663. Notice of Appeal.

JUNE 2ND, 1899.

In this cause Mr. R. E. Morrison, attorney for appellant, in open court gave notice of appeal from the judgment of this court to the Supreme Court of the United States and moved the court that it fix the amount of the bond on appeal, and that the remittitur herein be stayed for sixty days.

Whereupon it was ordered by the court that the amount of the cost bond on appeal in this cause be fixed in the sum of one thousand dollars, and that the remittitur herein be stayed for sixty days.

255 In the Supreme Court of the Territory of Arizona.

B. F. THOMPSON, Plaintiff and Appellant,
vs.
D. M. FERRY, SIMON J. MURPHY, and Charles C. Bowen, Defendants and Appellees.
} Petition for Appeal. Filed June 2nd, 1899. Lloyd Johnston, Clerk.

Comes now the above-named appellant, B. F. Thompson, and, conceiving himself aggrieved by the final judgment entered by the supreme court of the Territory of Arizona, on the 15th day of March, 1899, in the above-entitled cause, in which the judgment of the district court of the fourth judicial district of the Territory of Arizona

in and for the county of Yavapai was affirmed, and which said judgment of the supreme court was rendered on appellant having brought said judgment of the said district court to said supreme court for review on appeal and prayed for the reversal of the same and remanding same back to the said court below for trial—

Therefore the said appellant hereby appeals from the said judgment of the said supreme court of the Territory of Arizona to the Supreme Court of the United States, and prays that his appeal may be allowed, and that a transcript of the record and proceedings,
the judgment, decision, and opinion in this cause be certified
256 and duly authenticated and sent to the Supreme Court of the
United States, and that the amount of the cost bond on appeal be fixed by order of this court.

ROB'T E. MORRISON,
Att'y for Appellant.

And now, on, to wit, this 2nd day of June, 1899, the appeal prayed for in the foregoing petition is hereby allowed, the value of the matter in dispute, to wit, the value of the property in controversy, exceeding the sum of five thousand ($5,000) dollars, with citation to issue on appellant filing a bond in the penal sum of one thousand dollars, with two or more good and sufficient sureties, as is required by law, to be approved by the chief justice of the supreme court of the Territory of Arizona; and remittitur stayed for 60 days.

WEBSTER STREET,
Chief Justice of the Supreme Court of the Territory of Arizona.

257 In the Supreme Court of the Territory of Arizona.

B. F. THOMPSON, Plaintiff and Appellant,
vs.
D. M. FERRY, SIMON J. MURPHY, and Charles C. Bowen, Defendants and Appellees.

Affidavit of Value of Matter in Dispute. Filed June 2nd, 1899. Lloyd Johnston, Clerk.

TERRITORY OF ARIZONA, *County of Maricopa,* } *ss:*

Robert E. Morrison, being first duly sworn, deposes and says that—

He is one of the attorneys of record of the appellant, B. F. Thompson, and his agent in this behalf.

That the matter in dispute in the above-entitled cause exceeds in value the sum of five thousand ($5,000) dollars, being the value of the mining claims in controversy herein.

ROB'T E. MORRISON.

Subscribed and sworn to before me this 2nd day of June, 1899.

LLOYD JOHNSTON,
[SUPREME COURT SEAL.] *Clerk of the Supreme Court of the Territory of Arizona.*

258 In the Supreme Court of the Territory of Arizona.

B. F. THOMPSON, Plaintiff and Appellant,
vs.
D. M. FERRY, SIMON J. MURPHY, and Charles C. Bowen, Defendants and Appellees.

Appeal Cost Bond. Filed July 20th, 1899. Lloyd Johnston, Clerk.

Know all men by these presents that we, B. F. Thompson, as principal, and Robert Schofield and Homer M. Root, Hugo Richards, and Edmund W. Wells, as sureties, are hereby held and firmly bound unto D. M. Ferry, Simon J. Murphy, and Charl*s*e C. Bowen, the appellees herein, in the sum of one thousand dollars; for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The conditions of the above obligation are such that whereas the said appellant and principal, B. F. Thompson, has been granted and appeal to the Supreme Court of the United States from a judgment of affirmance rendered in the above-entitled cause by the supreme court of the Territory of Arizona,

If the above-named principal and appellant shall prosecute his appeal with effect and, if he fails therein, he answers and pays all costs herein sustained and adjudged against him, then this obligation shall be void; otherwise to remain in full force and effect.

259 Witness our hands this 12th day of June, 1899.

B. F. THOMPSON.
ROBERT SCHOFIELD.
HOMER M. ROOT.
HUGO RICHARDS.
EDMUND W. WELLS.

(I. R. stamps, 50c.)

STATE OF WISCONSIN, } ss:
County of Clark, }

Robert Schofield and Homer M. Root, being first duly sworn, each for himself and not for the other, deposes and says that he is a resident householder in the said county & State; that he is worth the sum of one thousand ($1,000) dollars, for which he has obligated himself on the within bond, over and above his just debts and liabilities, exclusive of property exempt from executions and forced sale.

ROBERT SCHOFIELD.
HOMER M. ROOT.

Subscribed and sworn to before me this 13th day of June, 1899.

FRANK T. TUCKER,
Notary Public.

[NOTARY SEAL.]

TERRITORY OF ARIZONA, } ss:
County of Yavapai, }

Hugo Richards and Edmund W. Wells, being first duly
260 sworn, each for himself and not one for the other, deposes and says that he is a resident householder in the said county and Territory; that he is worth the sum of one thousand ($1,000) dollars, for which he has obligated himself on the within bond, over and above his just debts and liabilities, exclusive of property exempt from executions and forced sale.

HUGO RICHARDS.
EDMUND W. WELLS.

Subscribed and sworn to before me this 18 day of July, 1899.
MOSES B. HAZELTINE,
[NOTARY SEAL.] *Notary Public.*

My commission expires July 24, 1899.

I hereby approve the above bond this 20th day of July, 1899.
WEBSTER STREET,
Chief Justice of Supreme Court of Arizona.

261 In the Supreme Court of the Territory of Arizona.

B. F. THOMPSON, Appellant,
vs.
D. M. FERRY, SIMON J. MURPHY, and Charles C. Bowen, Appellees.

Statement of Facts. Filed Aug't 17, 1899. Lloyd Johnston, Clerk.

Statement of Facts.

Statement of facts by the supreme court of the Territory of Arizona, sitting as a court of appeal, on the foregoing transcript on appeal from the district court of the fourth judicial district of the Territory of Arizona in and for the county of Yavapai, wherein judgment was rendered on a full hearing of the case in said district court in favor of said appellees and against the said appellant, as appears from the complete record of said cause now on file in this court, and which said judgment has been brought to this court on appeal by appellant herein.

The supreme court of the Territory of Arizona takes the facts as certified to be the clerk of the said district court of Yavapai county, Arizona Territory, as found in the original papers in said cause, to wit, the judgment-roll, and forwarded by the said clerk and now on file in the office of the clerk of this court; also the minute entries
262 in said cause, certified to by said clerk of said district court, together with the findings of facts of the court below, the motion for a new trial, and the reporter's transcript of the evidence taken on the trial of said cause below, all certified to by said clerk of said district court as being the whole of the record of

said cause, and also the assignment of errors filed by appellant herein and contained in his brief on file herein, and the facts shown by the whole record herein as the facts shown in this cause and makes the same the statement of facts as found in the transcript in this cause the facts as found in this case.

That from such transcript and from the same as the statement of facts herein this court finds that the said district court did not commit error in rendering judgment against the said appellant and in favor of said appellees; that the said appellees were the owners of all the right, title, and interest in the Poland and Hamilton mining claims, free from any claim of appellant.

And the supreme court further finds that the judgment of the said district court should be affirmed, and therefore affirms the same.

Done this 10th day of August, 1899.

WEBSTER STREET,
Chief Justice of the Supreme Court of the Territory of Arizona.

263 In the Supreme Court of the United States.

B. F. THOMPSON, Appellant, *vs.* SIMON J. MURPHY, C. C. BOWEN, and D. M. Ferry, Appellees.	No. 663. Assignment of Errors. Filed September 16th, 1899. Lloyd Johnston, Clerk.

Assignment of Errors.

The appellant in the above case, who was the plaintiff in the court below, comes and makes the following assignment of errors alleged to have been committed by the supreme court of the Territory of Arizona in affirming the judgment of the court below:

The supreme court of the Territory of Arizona, sitting as a court of appeals and review, and reviewing the proceedings of the district court of the fourth judicial district of the Territory of Arizona within and for the county of Yavapai on appeal of the appellant herein, erred in affirming the said judgment of the said district court as follows:

First. Erred in sustaining the judgment of the said district court, in which the court rendered judgment in favor of appellees herein, and sustaining thereby the said appellees' plea of the statute of limitations of the Territory of Arizona in bar of appellant's action.

Second. In sustaining the judgment of said court below in finding by its judgment that the appellees herein were the
264 owners of and entitled to the possession of the Poland and Hamilton mining claims described in appellant's complaint herein.

Third. Erred in sustaining the judgment of said court below in finding that the relocation of the Poland mining claim by Dickey was an act evidencing an adverse holding and a holding hostile to appellant and his interest in said mining claim.

Fourth. Erred in sustaining the judgment of said court below in

finding that the applications for patents to the said Poland and Hamilton mining claims were equivalent to disseizin and ouster, appellant and Schofield being co-owners with Dickey, the applicant for the patents, and Dickey was acting as trustee for them in so doing to the extent of their one-half undivided interest in the said mines, and Dickey had never advertised out said appellant and Schofield under paragraph 2324, R. S. U. S.

Fifth. Erred in sustaining said judgment of said court below in rendering judgment that the said appellees were not the trustees of the said appellant for an undivided one-half interest in said Poland and Hamilton mining claims.

Sixth. Erred in sustaining the judgment of said court below in rendering judgment that said appellant was not a cotenant with said appellees to an undivided one-half interest in and to the said Poland and Hamilton mining claims.

Seventh. The court erred in sustaining the judgment of said court below in rendering judgment that the failure of the appellant to contribute to the performance of the annual assessment-work
265 on said mining claims and remaining silent, and not asserting title to said mining claims for more than three years previous to the filing of the complaint herein, were such acts as destroyed the title of the said appellant to his interest in the said Poland and Hamilton mining claims.

Eighth. Erred in sustaining the judgment of the court below in rendering judgment that the said appellees and their predecessors in interest were for more than three years previous to the filing of the complaint herein in the court below in open, notorious, exclusive, peaceable, and adverse possession of said mining claims, and that this action was barred by the statute of limitations under section 2211 of the Revised Statutes of Arizona, 1887.

Ninth. Erred in sustaining the judgment of the court below in rendering judgment that the statute of limitations of the Territory of Arizona, as found in paragraph 2211 of the Revised Statutes of said Territory, 1887, was a good defense to an action praying that appellees be declared co-owners with appellant in the title to the mining property described in the complaint herein, to wit, the Poland and Hamilton mining claims.

Tenth. Erred in not holding that the judgment of the court below should be reversed and remanded for a new trial, the said judgment of the court below being contrary to the law applicable to the case.

Eleventh. Erred in holding that under the equitable doc-
266 trine of laches the appellant was estopped at the time of the filing of his complaint herein from asserting that he was a cotenant with appellees, and that appellees were the trustees of the title to an undivided one-half interest to the Poland and Hamilton mining claims for the use of appellant, the doctrine of equitable estoppel not being applicable as between co-owners to the mining claims under the United States mining laws, and appellees not having plead the doctrine of equitable estoppel in their answer to the action in the court below.

For all of which appellant prays a reversal.

ROB'T E. MORRISON,
Attorney for Appellant.

267 *Clerk's Certificate.*

UNITED STATES OF AMERICA, } ss:
Territory of Arizona, }

I, Lloyd Johnston, clerk of the supreme court of the Territory of Arizona, by virtue of the foregoing appeal and in obedience thereto, do hereby certify that the foregoing pages, numbered from 1 to 266, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of B. F. Thompson, appellant, against D. M. Ferry, Simon J. Murphy, and Charles C. Bowen, appellees, as the same remain of record and on file in said office.

Also, that the citation attached hereunto is the original citation issued by said supreme court of the Territory of Arizona.

In testimony whereof I have caused the seal of the said supreme court of the Territory of Arizona to be hereunto affixed, at the city of Phœnix, in the Territory of Arizona, this 16th day of September, 1899.

Seal Supreme Court of Arizona.

LLOYD JOHNSTON,
Clerk of the Supreme Court of the Territory of Arizona.

268 B. F. THOMPSON, Appellant,
vs.
D. M. FERRY, SIMON J. MURPHY, and CHARLES C. BOWEN, Appellees.

UNITED STATES OF AMERICA:

To D. M. Ferry, Simon J. Murphy, and Charles C. Bowen, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington on the 2nd Monday of October, 1899, pursuant to an appeal filed in the clerk's office of the supreme court of the Territory of Arizona, wherein B. F. Thompson is appellant and you, the said D. M. Ferry, Simon J. Murphy, and Charles C. Bowen, are appellees, to show cause, if any there be, why the judgment rendered against said appellant, as in said appeal mentioned, should not be corrected and reversed and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10th day of August, 1899.

WEBSTER STREET,
Chief Justice of the Supreme Court of the Territory of Arizona.

269 STATE OF MICHIGAN, } ss:
County of Wayne, }

Cassius P. Taylor, being first duly sworn, deposes and says that he is a United States deputy marshal for the eastern district of Michigan; that he served the foregoing citation upon the within-named defendants, D. M. Ferry, Simon J. Murphy, and Charles C. Bowen, as follows:

By delivering to the said D. M. Ferry personally a true copy of the within citation on 23d day of August, 1899, at Detroit, Michigan.

By delivering to the said Simon J. Murphy personally a true copy of the within citation on 25th day of August, 1899, at Detroit, Michigan.

By delivering to the said Charles C. Bowen personally a true copy of the within citation on 23d day of August, 1899, at Detroit, Michigan.

CASSIUS P. TAYLOR,
United States Deputy Marshal.

Subscribed and sworn to before me this 25th day of August, 1899.

[Seal of John Graves, Notary Public, Wayne Co., Mich.]

JOHN GRAVES,
Notary Public for Wayne Co., Mich.

270 [Endorsed:] No. 663. In the supreme court, Arizona Territory. B. F. Thompson *vs.* D. M. Ferry *et al.* Citation. Filed Sept. 16th, 1899. Lloyd Johnston, clerk.

Endorsed on cover: File No., 17,536. Arizona Territory supreme court. Term No., 144. B. F. Thompson, appellant, *vs.* D. M. Ferry, Simon J. Murphy, and Charles C. Bowen. Filed October 14th, 1899.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 144.

B. F. THOMPSON, APPELLANT,

vs.

D. M. FERRY ET AL., APPELLEES.

BRIEF OF APPELLANT.

STATEMENT OF CASE.

The subject-matter of this litigation is one-half undivided interest in the Poland and Hamilton mines and mining claims in Yavapai county, Arizona.

Both parties deraign title from the same common source, M. E. Collins, as the basis and origin upon which this dispute (limitation, which was sustained by the court, and on which only appellees prevailed) arose.

True, both sides introduced the same evidence, beginning with the location notices of the respective mines, to wit, the Poland and Hamilton, and ending with the United States patents to Dickey and various transfers down to appellees.

But as to the title in this particular dispute, it begins in Marcellus E. Collins. Both parties to this litigation derived title from the same common source. So that the only necessary tracing of the title of the respective sides begins with Collins, and it therefore becomes unnecessary to go further back than the title which began in him.

PLEADINGS.

The plaintiff in his declaration or complaint brought his action to quiet title in himself to an undivided one-half interest in the Poland and Hamilton mining claims. He declared title in himself, alleging the history of the title from the location down to the transfer of the one-half interest sued for, as it was transferred to him by Collins and Scofield, and demanded a decree of the court that he be declared the absolute owner of an undivided one-half interest in the said Poland and Hamilton mining claims, and entitled to the undisputed possession of the same; that the defendants, appellees here, be declared to be trustees for him as holding the said one-half interest in trust for him, and that they be required to convey that interest to him; that they be enjoined, &c., from asserting any right or title thereto. (See plaintiff's amended complaint, page 17, folio 34, to page 23, folio 46, printed Record.)

In this it will be seen that he deraigns title from M. E. Collins.

The defendants below, appellees here, in their answer plead an estoppel of record, alleging the action of Roberts against M. E. Collins to foreclose a mortgage given by Collins to Roberts on October 25, 1883, setting up that all of the inter-

est of Collins was adjudged to be subject to the lien, and that the interests of Collins and Scofield were sold, &c.

They further allege that if plaintiff ever had any interest in said mining claims that the same was destroyed by reason of the fact that E. M. Dickey, one of defendant's grantors, had obtained patent from the United States Government in his own name and on his application, and no adverse proceeding had been taken by either Scofield or Thompson during the pendency of the application. In other words, no "adverse" was filed when his application was pending.

They also set up innocent purchase, and finally plead adverse and hostile holding and limitation of the statute, which made the issues between the respective parties, plaintiff and defendant. (See defendant's amended answer, pages 3 to 5, folios 11 to 23, printed Record.)

NOTE.—There are other pleadings of the parties shown in the record, but the issues were finally narrowed down to this amended complaint and amended answer, and upon these and the issues joined by them the case was tried.

RECORD EVIDENCE.

Plaintiff introduced location notices and other muniments of title really not material, but we begin with the material evidence, the deed of Edward W. Russell, of Chicago, to Marcellus E. Collins, to one-half undivided interest in the Poland and Hamilton mining claims, dated October 25, 1882 (folios 156, 157, inclusive, printed Record). This is the first one-half interest ever obtained in the claims by Collins.

Second. Mortgage of M. E. Collins of this same one-half interest to John M. Roberts, dated October 25, 1883, exe-

cuted one year after Collins acquired this title (folios 159–163, inclusive, printed Record).

We note that this mortgage to Roberts, October 25, 1883, of one-half interest in the Poland and Hamilton mining claims, was all the interest he then owned, and the record showed it, as was stated at the trial, and this is the beginning of the title of defendants below, by authority of which they claim the whole property.

Third. Twenty days thereafter M. E. Collins bought from one Charles C. Lane one-fourth interest in the Poland and Hamilton mining claims, deed dated November 14, 1883. (See folios 163–166, inclusive, printed Record.) On the same day M. E. Collins sold the same one-fourth interest to Robert Scofield. (See Collins' deed to Scofield, folio 166, at page 85, folio 168, page 86, printed Record.) This was an interest not incumbered by the mortgage, of course. Two days later, on November 16, 1883, Collins bought another one-fourth interest in the Poland and Hamilton mining claims from John Howell. (See Howell's deed to Collins, page 87, folio 169, printed Record.) These two undivided one-fourth interests thus obtained by Collins from Lane and Howell after the execution of the mortgage to Roberts of the first one-half interest acquired comprise the interest in the Poland and Hamilton mining claims here sued for, which were never covered by the mortgage, never intended to be, and, so far as the record is concerned, known not to be.

Fourth. Plaintiff next introduced deed of M. E. Collins to B. F. Thompson, the present appellant and plaintiff in the

case below, showing the transfer by deed from Collins to Thompson of an undivided one-fourth interest to the Poland and Hamilton mining claims, dated August 18, 1884. (See Collins' deed to Thompson, folios 172–174, inclusive, pages 88, 89, printed Record.)

Fifth. Plaintiff next introduced deed of Scofield to Thompson, the plaintiff in this case, of date July 23, 1896, recorded in Book 35, at page 590, records of Yavapai county, Arizona, conveying an undivided one-fourth interest to the Poland and Hamilton mining claims.

Now, this deed of Collins to Thompson of August 18, 1884, and that of Scofield just mentioned, completed the title to the one-half interest of Thompson in the mining claims sued for, and comprise his interest, the subject-matter of this suit. (That this deed was made part of the record, see folio 71, page 36, printed Record.)

This completed plaintiff's evidence of title.

Defendants below, appellees here, began by introducing the complaint and judgment-roll, showing the foreclosure of the mortgage from Collins to Roberts of the one-half interest he first acquired from Russell in 1882 (pages 90–97, inclusive, folios 175–191, inclusive, printed Record).

It will be noticed at this point that the mortgage exhibited and executed by Collins was somewhat ambiguous in description. It purported to be a mortgage of all of the right, title, and interest that the said party of the first part (Collins) had in and to the Poland and Hamilton mining claims. "All of his right, title, and interest" was what was mortgaged, the particular amount or extent of which was not named, but the records of titles at that time, of which the world had to

take notice, showed that he had but a one-half interest, and that one-half interest was obtained from Russell. Roberts, of course, knew it personally.

We might further note that it is our serious contention, which we believe can't be denied, that when an interest in realty is conveyed or encumbered and the extent of it is not denominated in the instrument conveying or encumbering it, the party taking is necessarily put upon inquiry and *must know* what the record shows.

The record having shown that he had but a one-half interest, they must know that he had but that interest.

Second. They introduced certificate of sale on foreclosure given by sheriff to Roberts of the original mortgage. (See folios 191–193, inclusive, pages 97, 98, printed Record.)

Third. They next introduced deed from Sheriff Mulvenon to John M. Roberts, reciting the mortgage; reciting the decree purporting to foreclose all the right, title, and interest of Collins in the mining claims; reciting the receipt of the purchase-money covering the amount of the mortgage, and concluded with the grant of said Roberts to his heirs and assigns forever "all that particular mining lands, mining grounds and mining claims known as the Poland and Hamilton."

NOTE.—This would seem to be an effort to convey all the property by the authority of a mortgage and a decree foreclosing, conveying but one-half of it, and the decree directing *that interest only* to be sold.

We apprehend, however, that this can't be construed and will not be attempted to be construed as a conveyance of but the one-half first encumbered by the mortgage itself and decreed to be sold by the court.

It seems from the record that Roberts died. On the 20th day of July, 1891, his administrator sold to one E. M. Dickey, by order of the probate court of Yavapai county, the Roberts interest in these mines, the granting part of it being as follows: "All of that particular mine or mining claim named and designated as the Poland; also the Hamilton mine or mining claim," referring to book and page. (See deed of Lowry, administrator, to Dickey, pages 101–103, printed Record.)

Now, this particular sale and this authority and this interest were all derived from the Russell deed to Collins, executed October 25, 1882, which was mortgaged to Roberts a year later, and all of which the record emphatically shows and nobody denied.

Necessarily the purchaser had to know the record status of his title, and in law he did know it.

Dickey could take nothing but the one-half interest owned by Collins and owned by Roberts. Nothing more could be conveyed. The one-half interest in this property that was obtained by Collins after this mortgage certainly was not encumbered, certainly was not intended to be, and was not intended to be sold by the decree.

After Dickey obtained this property under administrator's sale in 1891, on May 1, 1893, and on June 20, 1893, respectively, on his individual application beginning some time in 1893, he obtained and filed for record patents of the United States in his own name to the Poland and Hamilton mining claims. (This we gather from the printed Record, at page 43, which patents were considered by the courts below.)

This seems to be the beginning of his record acts of hostility and adverse holding, if, indeed, he may be permitted

to ignore his statutory remedy provided by "advertising out," and substitute one of his own.

They next introduce (as shown on pages 42, 43, printed Record) deeds of Dickey to C. D. Armes, and also of C. D. Armes to E. B. Gage, May 4, 1895 (see folio 78, printed Record); deed of E. B. Gage to D. M. Ferry *et al.*, May 13, 1895 (folio 76, printed Record); E. M. Dickey to F. M. Murphy, March 10, 1892 (folio 79, printed Record), and deed of F. M. Murphy to D. M. Ferry *et al.*, July 2, 1894 (folio 78, printed Record).

This completed the chain of title upon which defendants base their claim to all the property and upon which they base the strength of their plea of limitation, by all of which is shown that they began with a mortgage encumbering one-half of the property, and they knew it and had to know it, and wind up by claiming it all without paying for the half belonging to plaintiff Thompson.

It will be noticed from this record and from the answer (that is, the amended answer) of defendants below that they claim by limitation, saying that they have been in hostile possession for more than five years, and on that they base their plea of limitation.

It would seem, however, from one feature of the record (found at folio 80, page 40, printed Record) that the facts show that Dickey, on his application from his own filing from a location he made himself on December 14, 1891—(the language is this, "by Mr. Johnston, notice of location of Poland mining claim by E. M. Dickey," which states that it is a relocation of the Poland mining claim, dated December 14, 1891; recorded December 15, 1891, Book 33 of Mines,

pages 17, 18)—ignored the title by which they now claim he was holding.

This would certainly be ignoring the adverse holding—that is, the title that he *claims* to have by adverse holding.

This completed the record evidence bearing directly upon the issues made by the pleadings and gave the legal record status of the two respective sides at the time the action was brought.

True, there was some oral evidence offered attempting to show abandonment and other matters, which were not sustained and which the court paid no attention to, as we gather from its decree.

The court filed a written opinion rendering its findings and decision to the following effect: "I find therefore that the defendants' plea of the statute of limitations is well taken." "There is another question of great interest which I have considered somewhat, and that is whether or not the judgment and decree in Roberts *vs.* Collins operate as an estoppel of record against the defendants." "As, in my judgment the statute of limitations disposes of the case, I do not deem it necessary or essential to state my conclusions on this question," and concludes by saying "Judgment will be entered for the defendants." (See opinion of district court, folios 206–223, pages 104–112, printed Record.)

This was appealed to the supreme court of the Territory (as shown by printed Record from folio 223 to 233), and on hearing on appeal the supreme court sustained the findings and judgment of the court below on the plea of limitation, the court saying that the district court found for the defendants, "that the defendants for five years before suit filed October 6, 1896, had been in open, notorious, exclusive, and

peaceable and adverse possession of both the Poland and Hamilton mining claims, and plaintiffs were barred by the statute of limitations, from which judgment plaintiffs appealed." On the question of limitation alone the district court decided the case, and decided no other question. The supreme court affirmed this judgment, and further held a question that was not passed on by the court below at all, that under the equitable doctrine of laches Thompson was estopped from asserting that he was a cotenant and that appellees are trustees of the title for his use. (See opinion supreme court, page 117, folios 234–245, printed Record.)

A motion for rehearing was presented to the supreme court upon alleged error. (See folios 246–254, inclusive, printed Record.) It was denied, and from that judgment and decree sustaining judgment and decree of the court below and adding to it a decree of estoppel, of record, against Thompson, which was not passed on by the court below at all and not before the court on appeal, because not included in the judgment below, the plaintiff Thompson, the appellant here, has appealed the case to this court for review and determination; and, for a reversal of the judgment of the supreme court, we make the following assignment of errors alleged to have been committed by the supreme court:

We say first that the court erred in finding that the plea of the statute of limitations was a good defense and that the statute had run at the time the suit was begun, because—

First. The statute of limitations of the Territory of Arizona, which applies in this case, is not applicable where the property involved is a mining claim, for the reason that the Revised Statutes of the United States, section 2324, provides a remedy and a method by which co-owners in mining

claims can acquire the title of their co-owner who fails to contribute his portion of the expenditures required for annual assessment-work, &c. This is a remedy provided by the Federal statute, and by it persons seeking to be relieved from burdens by co-owners must be governed. They cannot disregard and ignore the statutory remedy and make a remedy of their own in lieu of it.

Second. The sheriff's deed to Roberts, mortgagee, was a sale of but one-half interest, and Roberts knew it, and the world had to know it, because it was a matter of record, and the extent of the interest not being defined by the mortgage or by the decree, therefore purchasers were put on inquiry and driven to the record to see what the interest was and the extent of it.

Third. Because Collins having obtained a one-half interest in the Poland and Hamilton mining claims, which he didn't own at the time he gave the mortgage, and which was therefore not incumbered by the mortgage, but which he did own at the time of the foreclosure and the purchase of the half interest incumbered or mortgaged to Roberts, therefore made Roberts, Collins, and Scofield, to whom Collins had conveyed a one-fourth interest, joint owners or tenants, or tenants in common in the property; and therefore, being joint owners or co-owners or cotenants in common in the mining claims, they were bound to follow the remedy provided by the Federal statute in disposing of the interest of the other co-owner in the property—that is, by what is termed "advertise him out"—which could be done in ninety days either by public notice or personal service.

Roberts and Collins and Scofield being cotenants and joint owners of the mining claims, necessarily Dickey, as the successor in the interest of Roberts, was, and also had to be, and was, bound by the same rule.

In the next place, the court erred in holding that, under the equitable doctrine of laches, Thompson was barred or estopped by the record:

First. Because the question had not been decided by the court below, and therefore was not pertinent for decision there.

Second. The court assumed to pass its judgment upon the fact that the plaintiff Thompson had moved his mill from the mining claim and hadn't aided defendants and their predecessors in title in doing the assessment-work, and therefore because of that the court ignored the remedy of advertising out provided for by the Federal statute, by which one cotenant might absorb the interest of another, and endorsed the course taken by the defendants who ignored the statutory remedies provided for them. We say that there is no law provided which requires the loss of any interest of a cotenant or joint owner in mines by any other method than by advertising out, as provided by section 2324 of the Revised Statutes of the United States.

Therefore our reason is, in this assignment that, where a statute fixes a mode of absorbing an interest, or provides a remedy, if you please, for a joint owner, he must follow it and can't substitute it with some other course—one of his own.

Third. The court erred in finding that the deed from Lowry, administrator of Roberts, to Dickey was notice to

Scofield and Thompson that Dickey's entry was hostile to them and was notice to them that his holding was coextensive with his deed, because the Lowry deed could convey no more interest than Roberts first obtained at the foreclosure sale, which was an undivided one-half interest, which the record showed, and it could be no more; and, furthermore, the law requires actual notice to be proven by defendants. They didn't do it.

Fourth. The court erred in finding that the relocation of the Poland claim was an act evidencing an adverse holding, and even if it did it was not five years before the bringing of this suit, and, in the next place, the claim was not subject to location at that time.

Fifth. The court erred in finding the application for patents by Dickey to the mines equivalent to a disseizin and ouster, because Thompson and Scofield were co-owners with Dickey, who was the applicant for the patent, and, not having pursued his statutory course before named, in equity he was acting as trustee for them to the extent of their undivided one-half interest in the mines, for he had never advertised them out under section 2324, Revised Statutes of the United States; and, furthermore, even if it was a disseizin and ouster, this act did not bar this action, because it was not five years before the bringing of this suit.

Therefore we say that the facts in the case do not sustain the findings and judgment of the court, and for a correction of these errors we appeal to this court. (See assignment of errors filed in Supreme Court for consideration here, folios 227–232, printed Record.)

This statement of the facts of the case and the case as it is, we believe, bring out all of the legal propositions necessary to be decided and which are involved in this case.

We assume, therefore, in the first place, that the plaintiff Thompson and his predecessors in title or grantors from Collins down to himself were cotenants or joint owners in the mines known as the Poland and Hamilton, the owners of one undivided one-half interest, and Roberts and his successors in interest the other.

They being joint tenants, cotenants, or owners in common, if ousted, should have been, and necessarily had to be, ousted by the remedy provided by statutes for such identical cases and precise purposes, and therefore the statute of limitations did not run or begin to run until that course had been taken and their interest by that means disposed of, which was never done.

In the second place, if there was ever disseizin and ouster, if it ever took place at all (which, if taken, forces us to ignore the statute providing a remedy for such cases), it began with Dickey's action to obtain title from the Government in the issuance of patents to him and his filing the same for record claiming to hold and own all, at which time and only at which time he then deraigned title from the Government itself.

Ordinarily, of course, this would be hostile, but being mines and subject to statutory rules for ouster, it was not therefore hostile. But even if it was, it was less than five years before the commencement of this action, and therefore didn't bar the action, and we assume, and rely upon it implicitly, that this is the first real act of apparent legal hostility to a co-owner's title that anywhere appears of record.

We assume, in the next place, that the plaintiff and his grantors, having been co-owners in mining claims and mining lands, could not be estopped of record from setting up this claim at the time this suit was brought, because defendants and their grantors failed to give them notice of any adverse claim to their interests which they claimed to hold against them, as provided by section 2324 of the Federal Statute for advertising out, it being the only statutory remedy providing for notice of hostility and which they were bound to follow, and therefore plaintiff and his grantors had a right to rest composedly upon their joint ownership and upon a knowledge of the fact that when a co-owner or cotenant holds the whole property for himself he holds for all of his co-owners.

In the next place, we assume that when Dickey took the United States patent to all the property in his own name the law will hold him responsible as a trustee for his co-owners, and that he took the title in trust for them, and that therefore they are entitled to have their rights so declared.

We assume that the statement of facts of record bring out these legal propositions, and that they are abundantly sustained by the authority which we shall now proceed to show.

At date of sale to Roberts he became joint owner with Collins and Scofield. So, also, became his grantees and subsequent holders. His holding afterwards, and likewise the holding of his grantees, were the holding for all. The holding by one was in trust for all, *unless* there was disseisin and ouster, and disseisin and ouster of one cotenant by another can only be as provided by law.

In the case at bar, therefore, there was no ouster. Hence, no limitation, because—

1. See section 2324, Revised Statutes United States.

This section, among other things, provides that:

"Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing, or by publication published in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days, &c., &c., the delinquent should fail to contribute his proportion, &c., his interest in the claim shall become the property of his co-owners, who have made the improvements."

This is the *only* course provided by statute for ouster in such cases.

They do not pretend that this was ever done or ever attempted. Query, Can it be ignored and a different remedy substituted by the party ignoring it? We assume it cannot.

2. They were cotenants, co-owners, in the joint estate, and therefore trustees for each other, and hence, from this record, there was no ouster of a joint owner under general law, for the rule is:

1. The statute of limitations, as between trustee and *cestui que trust*, has no application and no length of time is a bar.

2. If, however, a trustee, whether of an express or of a constructive trust arising by operation of the law, repudiates

his trust, the statute *will not* begin to run in his favor until his *denial of the trust is distinctly brought to the notice* of the *cestui que trust*—it must be brought home to him—and when the trustee relies on the statute of limitations the *burden is on him to show* when notice of his repudiation was brought home to the *cestui que trust.*

This is the text law in this country.

See Perry on Trusts, sections 863, 864.

This doctrine is also expressly declared in the following cases:

Hunt *vs.* Patchin, 35 Federal Rep., 816.
Zeller *vs.* Eckert, 4 Howard, 295.
McClasky *vs.* Barr, 47 Federal Rep., 154.
Union C. Silver M. Co. *vs.* Taylor, 100 U. S., 541.
Turner *vs.* Sawyer, 150 U. S., 578.

In Zeller *vs.* Eckert the action was by one joint tenant against another after twenty-five years' holding, after limitation would bar the action when no privity existed. Limitation was pleaded and on this point this court, speaking through Justice Nelson, drawing the distinction between cases where privity of estate did not exist and cases where it did, said:

"The only distinction between this class of cases and those in which no privity between the parties existed when the possession commenced is in the degree of proof required to establish the adverse character of the possession." "As that was originally taken and held in subserviency to the title of the real owner, a clear, positive, and continual disclaimer and disavowal of the title, and assertion of an adverse right,

and notice to be brought home to the party, are indispensable before any *foundation can be laid* for the operation of the statute."

In Hunt *vs.* Patchin, 35 Federal Rep., 816, it is expressly held there, in such cases, in the proof of the notice of disclaimer and adverse holding, which would bring the notice home to the co-owner against whom he held, that the burden was on him who pleaded the statute.

In the case at bar there is a total absence of this degree of proof required by these cases. There is no proof of *actual* notice whatever; no pretension that there was any.

In McClasky *vs.* Barr, 47 Federal Rep., 154, the action was for partition of a joint estate, in which many disputes between the joint owners arose; among them the plea of limitation by some of the long-time holders was set up, and on that point the court said:

"Much stress is laid on the character of the defendant's occupancy, and there is a showing of the costs of expensive and permanent structures and improvements, amounting between 1875 and 1890 to nearly $1,000,000.00, as indicating ouster and adverse possession and notice, and numerous authorities are cited in support of that contention."

"But," said the court, "we must not lose sight of the fact that the original possession of the defendants and of their grantors was in privity with the title of the rightful owners, and that it is admitted that neither complainants or cross-complainants ever had *actual* notice of an adverse holding (in this case at bar certainly no proof of it), and in that view the character of defendant's occupancy, permanence or cost of improvements and their long list of decided cases fade

into nothingness before the decision of the Supreme Court of the United States in Zeller *vs.* Eckert."

The case at bar falls clearly before the principles of this case also. While in McClasky *vs.* Barr it was admitted that *actual* notice had not been "brought home" to complainants, and while such admission is not patent in the record in the case at bar, it is equally clear that the defendants here as clearly failed in their plea of limitation as they did in the Barr case, because they, in this case, *wholly failed* to prove *actual* notice, &c. The record is as silent as the grave on it, and they had to prove it—prove *actual* notice of disclaimer of plaintiffs' rights and adverse holding thereto for the statutory period before their plea could avail, because the "*onus was on them.*"

In Mining Co. *vs.* Taylor, 100 U. S., 37, the action was ejectment by a co-owner against another for an undivided interest in a mining claim in Nevada. Limitation was pleaded and strongly urged, but it failed because of the application of the principles above stated.

Turner *vs.* Sawyer, 150 U. S., 578, was an action to quiet title—to have defendant Turner declared a trustee for use of plaintiff for an undivided interest in a mine, "the Wallace lode."

It was similar to the case at bar, having similar facts upon which the case was determined.

Turner claimed title to all the property by virtue of sheriff's deed, purporting to convey all, as defendants in the case at bar pretend to claim.

He, claiming under the sheriff's deed, secured United States patent all in his own name, just as defendants here through Dickey did.

But the court applied the principles of cotenancy and trusteeship there as in the cases before cited, and said:

"Whether he procured the receiver's receipt by fraudulent or false representations or not, as charged in the bill, it is clear, to put on it the most favorable construction for him, that he acted under a misapprehension of his legal rights."

And he was declared a trustee and required to convey as prayed for in the bill.

Many other cases, of course, to the same effect might be cited, but surely these are enough.

From these there certainly was no disseizin and ouster, and therefore there could be no limitation.

Query. But after all does the statute of limitations of Arizona apply to this case?

Paragraph 2299 prescribing five years as the period of limitation, stating the terms for its application, and on this they rely.

But this section is followed by paragraph 2300, placing modifications on it in the following language:

"The peaceable and adverse possession contemplated in the preceding section, as against the person having right of action, shall be construed to embrace not more than one hundred and sixty acres, including the improvements or the number of acres actually enclosed, should the same be less than 160 acres," &c., &c.

The court knows judicially that two mining claims do not contain 160 acres, and there is no proof of enclosure.

If literally construed, can it apply? It really seems not.

One other thing on adverse possession. Notwithstanding it is the settled law that when one joint owner claims against another by adverse possession, actual notice, &c., must be

proven, in the court's finding of adverse possession it failed to find that such adverse possession had been or was "actual and visible."

Arizona Statutes, paragraph 2304. Revised Statutes, 1887, require it should be.

The finding, therefore, is not as the statute requires. Not only so, but such strength is required by this court.

See Ward *vs.* Cochran, 150 U. S., 597.

Furthermore, a tenant in common has a right to presume that the possession of his cotenant is his possession until notice to the contrary—notice actual, brought home—is served on him—reaches him.

This principle is not only elementary, but is maintained by the decisions of this court, and especially in Zeller *vs.* Eckert.

See also—

Miller *vs.* Miles, 46 California, 535.

Agrin *vs.* Alexander, 58 California, 21.

ESTOPPEL.

The trial court referred to the plea—estoppel by record—but did not decide it. The supreme court did, however, when it was not subject to review and reversal. However this may be, it was certainly error, because under no rule of law brought out by the facts in this record could plaintiff be estopped.

The failure to appear and answer at the foreclosure on the part of plaintiff and Collins could not do it, for there they had no answer to make. That was an action for foreclosure "of the mortgaged premises," in which they knew that they had no interest, and therefore no answer to make. The no-

tice to them was as to "the foreclosure of 'the mortgaged premises,' &c.," which they knew to be the half interest in which they had no interest. Hence no answer. The decree was for the foreclosure of this selfsame interest. Hence it did not, could not, affect our interest, that not being part of "the mortgaged premises"—not incumbered and not intended to be, not decreed against and not intended to be. Then how can any reliance be placed in estoppel for this cause?

"But we are told you failed to file your adverse when we applied for the patent, &c."

Our reply is: We did not have to. You and we were joint owners of the joint estate. We deraign title from the same common source, and that, therefore, the law did not require of us the filing and trial of an adverse.

This is emphatically decided in case of—

Hunt *vs.* Patchin, 35 Federal Rep., 816; also,

Turner *vs.* Sawyer, 150 U. S., 578—

where it is said:

"The propriety of such a claim was not a question which seems to have been contemplated in requiring the advertising of hostile claims."

And it is there declared to be the settled doctrine of this court that "advertising out" is not required where the title is deraigned from a common source and, or, held in joint estate.

If we are right, and we feel we cannot be wrong, the legal conclusion is irresistible that when Dickey secured the United States patents in his own name he did not thereby destroy the title of plaintiff Thompson and his grantors; but by

such act he became, and his grantors succeeding to his interests also became, trustees for an undivided half interest for plaintiff's benefit.

We say this because the settled rule is:

"A United States patent is received subject to all equitable obligations with which the patentee may stand charged in virtue of any trust or confidence resting upon him."

This is positively settled in—

Hunt *vs.* Patchin, 35 Federal Rep., 816 to 819.

And it is strongly supported by the following high authorities:

Kimball *vs.* McIntyre, 1 Pacific, 167.
Meador *vs.* Norton, 11 Wall., 457.
Stark *vs.* Starrs, 6 Wall., 419.
Reis *vs.* Spence, 21 Cal., 511.
Wilson *vs.* Castro, 31 Cal., 438.
Bloodworth *vs.* Lake, 33 Cal., 263.
O'Connor *vs.* Irvine, 74 Cal., 435.
Hollett *vs.* Collins, 10 How., 186.
Threadgill *vs.* Pintood, 12 How., 38.
Marquez *vs.* Frisbee, 101 U. S., 473; 25 Co-op., 800.
Johnson *vs.* Touley, 13 Wall., 72.
Bassick M. Co., *vs.* Davis, 17 Pac., 294.
Turner *vs.* Sawyer, 150 U. S., 578; 37 Co-op., 1189.

Upon these facts and authorities we confidently submit that the courts below committed error in failing to decree to us our rights as demanded in our bill, and therefore submit that a reversal should be had here.

J. F. Wilson,
Attorney for Appellant.

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No. 144.
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Filed Feb. 20, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 144.

B. F. THOMPSON, APPELLANT,

vs.

D. M. FERRY ET AL., APPELLEES.

SUPPLEMENTAL BRIEF FOR APPELLANT.

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SUPPLEMENTAL BRIEF FOR APPELLANT.

As matter supplemental to our original brief on the point that in an action to foreclose persons being impleaded and summoned to court on the allegation that they claim *some interest* in the subject-matter may not be concluded as to interest not actually encumbered or conveyed by the mortgage itself, we submit the following authorities:

Freeman on Cotenancy, section 225, says:

"It has never been considered that a conveyance by one joint tenant or tenant in common of all his interest in real estate, though the land is described in such a manner as to pass the whole under the deed if the grantor had owned the whole, is notice of itself to the other joint owners of such exclusive claim to the land as to oust him of his legal seisin in

the land. He has the right to suppose that by such a deed both the grantor and the grantee understand it to convey the real interest the grantor owns in the land. The above language seems to point to a distinction between a deed which on its face assumes to convey the land and one which without making such an assumption is nevertheless sufficient to convey title in severalty if such the grantor had because it purports to convey all his interests in the land. * * * One who assumes to convey his interest without specifying its extent instead of asserting his title to be perfect and in severalty, seems to put the purchaser on his guard, and to direct him to inquire concerning the nature and extent of his acquisition. Such a grantee in entering may be presumed to enter, not as sole owner, but as succeeding to the true interest of his grantor, for that is all with which the deed purports to deal."

SECTION 226. "But a conveyance alone without possession taken under it can never amount to an ouster. The same remark is applicable to a mortgage of the whole. If such mortgage can have any relevancy in determining whether the mortgagor had been guilty of an ouster, it must be in connection with other circumstances tending to show an intent to hold the property adversely."

See Purcell *vs.* Wilson, 4th Gratt., 21, which holds:

"That the possession of one coparcener or tenant in common being the possession of all, none in possession of the whole subject can avail themselves of such possession as a defense under the statute of limitation against the rest without an actual disseisin or ouster of their coparceners or cotenants."

In Davis *vs.* Settle *et als.*, 43 W. Va., 18, the court held:

"Common seisin in fact or law, without regard to source of title, creates cotenancy."

In Doknan *vs.* Glynn, 28 W. Va., 725, the court held:

"Facts in controversy on the trial of an issue, but not necessarily involved in the issue, though ever so important to its determination, are not settled by a judgment on the issue, but are open to controversy in any other suit between the same parties and their privies."

In Dial *vs.* Reynolds *et als.*, 6th Otto, U. S. R., 340, held:

"In a foreclosure proceeding the complainant cannot make a person who claims adversely to both mortgagor and mortgagee a party and litigate and settle his rights in that case."

In Lewis *vs.* Smith, 9th New York (5 Selden), 502, held:

"Decree against defendant made party to a foreclosure suit under general allegation that he claimed some interest in the premises as subsequent purchaser, or incumbrancer or otherwise, bars rights and interests in the equity of redemption, but not those which are paramount to the title of both mortgagor and mortgagee."

In San Francisco *vs.* Lawton, 18th California, 465, held:

"All persons are proper parties to suit to foreclose mortgage who are beneficially interested either in the estate mortgaged or the demand secured. This rule generally will only embrace the mortgagor and the mortgagee and those who have acquired rights or interests under them.

"In suit to foreclose mortgage, adverse titles to the premises held by the parties claiming by conveyance from the mortgagor prior to the mortgage or from third parties prior or subsequent to the mortgage are not the proper subjects of determination, but such titles must be settled in a different action.

"Foreclosure operates only upon estate or interest which *mortgagor possessed at the date of the mortgage, and the*

sale under the decree passes only such interest or estate, except in the single instance where the mortgagor has subsequent to the execution of the mortgage acquired a title which enures by way of estoppel to the benefit of the mortgagee, in which case the foreclosure operates upon the subsequent acquired title to the same extent as if originally held by the mortgagor, and the sale under the decree passes it. In all other cases the estate mortgaged is the *only estate* brought under the consideration of the court, and the *only estate* affected by its decree."

In Jones on Mortgages, vol. 2, section 1589, the author says:

"Where a party has a right under the mortgage and also a right prior to it he is not precluded in respect to the prior right by a judgment or foreclosure, though the terms of it are broad enough to cover both rights. Only the rights and interests under the mortgage and subsequent to it can properly be litigated upon a bill of foreclosure. * * * The decree is final only within the proper scope of the suit which is to bar interests in the equity of redemption."

See Rathbone *vs.* Hooney, 58th N. Y., 463.

See Boggs *vs.* Fowler & Hargrave, 16th California, 559.

By these authorities it seems plain that appellee's contention, that the half interest in the Poland and Hamilton claims not included in the mortgage at the date of execution, could be considered affected by the foreclosure proceedings and the decree is absolutely without authority. Hence no estoppel, and hence the joint tenancy contended for in our original brief, and hence no limitation.

J. F. Wilson,
Attorney for Appellant.

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cf°. 144.

Brf. & Argument for Appellees.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

B. F. THOMPSON, *Appellant,*
vs.
D. M. FERRY, SIMON J. MURPHY AND CHARLES C. BOWEN, *Appellees.*

Appeal from the Supreme Court of the Territory of Arizona.

BRIEF AND ARGUMENT FOR APPELLEES.

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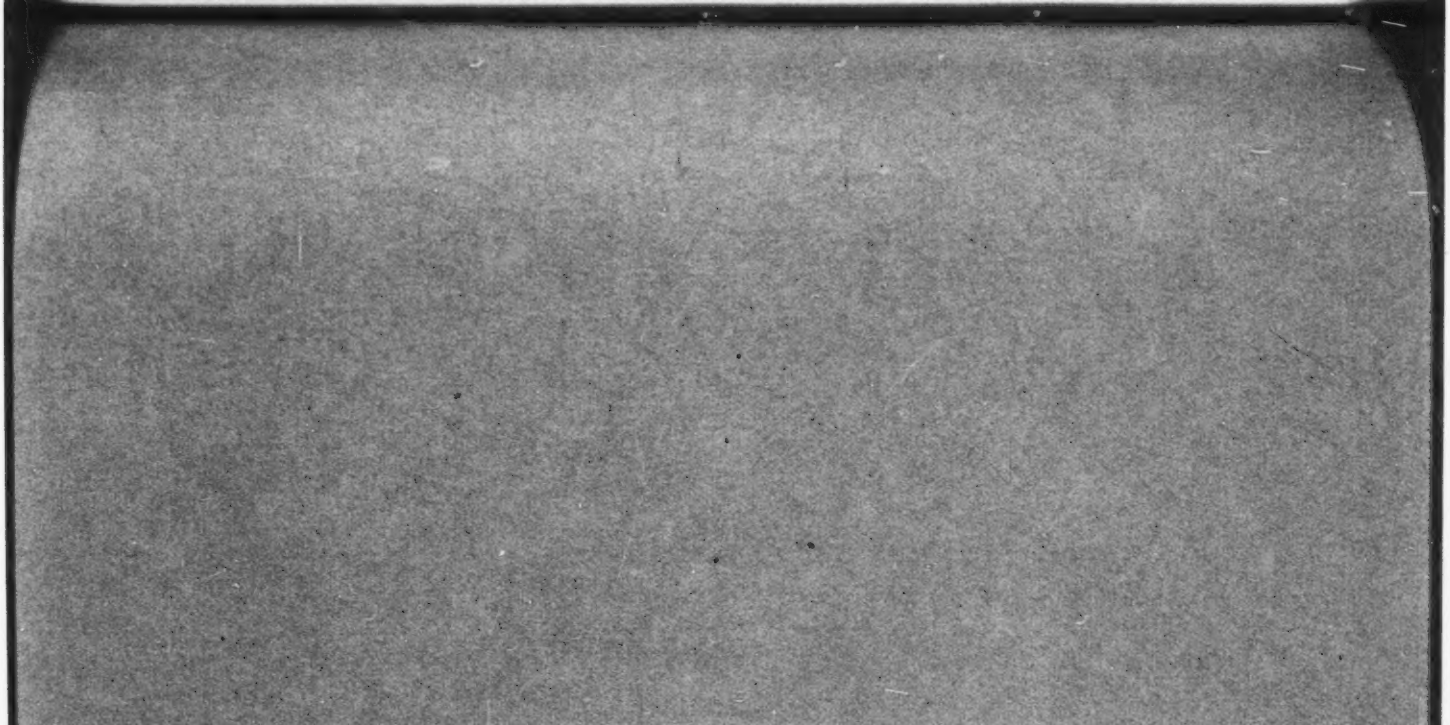

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1900.

B. F. THOMPSON, *Appellant,* vs. D. M. FERRY, SIMON J. MURPHY AND CHARLES C. BOWEN, *Appellees.*	Appeal from the Supreme Court of the Territory of Arizona.

BRIEF AND ARGUMENT FOR APPELLEES.

This suit was instituted October 6, 1896, in the District Court of the Fourth Judicial District of the Territory of Arizona, by appellant against appellees to quiet title in appellant to an undivided half interest in what is known as the Poland and Hamilton Mining Claims, situated in the Big Bug Mining District, in Yavapai County, Arizona.

The facts are: On October 5, 1883, M. E. Collins was the owner of an undivided one-half interest in the Poland Mining claim and one-half interest in the Hamilton Mining claim, both unpatented claims situated in the Big Bug Mining District.

On that day Collins executed a mortgage of all his right, title and interest in this property to John M. Roberts to secure the payment of a certain promissory note executed by him to Roberts. At that time Charles C. Lane and John Howell were the owners of the other one-

half interest, each owning an undivided one-fourth interest. On November 14, 1883, the mortgage still subsisting and of record, Lane conveyed his one-fourth interest to Collins, the mortgagor, and on the same day Collins attempted to convey by deed, that one-fourth interest to Robert Schofield.

On November 16, 1883, the mortgage still subsisting and of record, Howell conveyed his one-fourth interest to Collins, the mortgagor, and on August 16, 1884, Collins attempted to convey by deed an undivided one-fourth interest to Thompson, appellant. And afterwards and on July 23, 1896, Schofield attempted to convey to appellant the one-fourth interest conveyed to him by Collins.

On August 21, 1886, Roberts brought suit in the District Court of Arizona to foreclose the mortgage of October 12, 1883, wherein he alleged its execution and the failure of Collins to pay the note, and that Schofield and the appellant Thompson claimed some interest in the Hamilton and Poland Mining claims, which interests were subject to the lien of this mortgage, and prayed that such alleged interest of Schofield and Thompson be held subject to the lien of the mortgage, and that they be forever barred from the same, and for foreclosure of mortgage, etc.

Personal service was had upon Schofield, and service by publication and by copy of complaint under the Arizona statute was *had* on Collins and appellant.

The District Court in the foreclosure proceedings found as a fact that all defendants therein had been duly served with process; that the court had jurisdiction of the persons of the defendants and of the subject-matter, and

decreed that the mortgaged property be sold to satisfy the debt of Roberts; that the interest of Schofield and appellant had been acquired subsequent to the execution of the mortgage, and was subject to the lien thereof. (See Foreclosure Decree, Rec., 95.) Pursuant to the decree the entire Poland and Hamilton mining claims were sold at judicial sale to Roberts, who became the purchaser and received a sheriff's certificate of sale and afterwards a sheriff's deed of the property so sold.

Afterwards and on July 20, 1891, the administrator of the estate of Roberts conveyed the Poland and Hamilton mining claims to E. M. Dickey. After taking title as such grantee to both claims Dickey formally relocated the entire property in his own name and immediately entered into the unqualified, exclusive and adverse possession. Thereupon and on December 17, 1891, while thus in possession of both claims Dickey, pursuant to Section 2325 of the Revised Statute of the United States and the mining laws, applied to the registrar of the United States Land Office at Prescott, Arizona, for a patent to the mining claims, and such proceedings were then had that he was adjudged by the registrar to be the sole and exclusive owner of the Poland and Hamilton mining claims, and entitled to a patent to the entire property in his name. The patent issued.

Afterwards and on April 10, 1892, Dickey conveyed an undivided one-half interest in the mining claims to F. M. Murphy. Later, and on December 2, 1894, Dickey conveyed to Charles D. Arms the other undivided one-half interest. On July 2, 1894, F. M. Murphy conveyed his undivided one-half interest to D. M. Ferry, Simon J. Murphy and Charles C. Bowen, the present appellees, and on May 13, 1894, E. B. Gage (who on May 4, 1894, be-

came the grantee of the Arms one-half interest) conveyed an undivided one-half interest to Ferry, Bowen and Murphy, the appellees. And thus the appellees, by mesne conveyance for and upon valuable considerations, became vested with the legal title to the entire mining property in question.

Ten years after the decree of sale in the Roberts foreclosure case, nine years after the issuance of the sheriff's deed to Roberts, five years after the purchase of the entire property by Dickey, and two years after the legal title vested in appellees by the series of mesne conveyances, the appellant began this proceeding in the District Court of Arizona, claiming to be the owner of an undivided one-half interest in the mining claims, in virtue of the conveyance of the undivided one-fourth interest of August 16, 1884, and of the alleged one-fourth interest on July 23, 1896. The prayer of his complaint is that the court decree that his title to said alleged one-half interest be quieted and that it be adjudged that appellees have no right, title or interest in or to said undivided one-half said to belong to appellant.

The conduct of appellant, so far as the same is material to the case, from the year 1884 to the time of the institution of the suit, is summarized by the Supreme Court of Arizona, in its opinion (page 122 of record) as follows:

> "In 1884 and 1885 the then owner of the properties—Collins, Schofield and Thompson—placed a mill on one of the mines or on land adjacent thereto and commenced development work for the purpose of immediate revenues. The proposition was a flat failure. Collins abandoned the idea of pursuing his interests in the claims further and allowed foreclosure proceedings of his mortgage. He went

away and left Schofield and Thompson in the vicinity of the mines. Schofield moved the mill away, and nothing from that day until the present has been done or attempted to be done on the mines by way of annual expenditures, development work, or work for revenue by either Schofield or Thompson. They were aware of the mortgage foreclosure proceedings by Roberts, and neither of them paid any attention to the suit or to the allegation of Roberts' complaint against them that they claimed an interest in the mines, nor opposed his prayer that their interests be foreclosed. After the execution of the sheriff's deed, Roberts alone performed the annual expenditure upon the mines up until the time of his death, and neither Schofield nor Thompson made any efforts to do anything with the mines or give any expression of their interests in them."

After each of the transfers of title from Dickey, beginning in the year 1892, the successive grantees went into possession of the entire property and for a time operated the mines. Appellant permitted appellees to expend $30,000 in development work, and appellant was fully aware of the various transfers of title and of the expenditures of large sums of money to make the property valuable and profitable, yet for ten years he remained silent, asserting no claim or interest in the mines and taking no steps whatever to establish the alleged claim now set forth in his complaint.

Appellees made these defenses:

1. An estoppel of record by virtue of the foreclosure suit of Roberts *vs.* Collins, Schofield and appellant.

2. That whatever interest appellant or his grantor may have had, the same was canceled and annulled by issuance of a patent to Dickey after judgment of title in Dickey by the patent office.

3. That appellees were actual *bona fide* and innocent purchasers without notice, actual or constructive, of any claim, legal or equitable, of appellant.

4. That appellees and their grantor had been in peaceful and adverse possession of said mining claim under title, or color of title, since September 30, 1887, and the statute of limitations is a complete bar to appellant's claim.

5. That irrespective of the statute of limitations appellant is guilty of laches in equity, which bars the relief prayed for, by permitting the exclusive possession, development work and improvements during a period of ten years of all of which appellant and his grantor had both actual and constructive notice.

The District Court held that appellant was not entitled to the relief prayed and dismissed the bill. (See Opinion of District Court. Rec., 104 *et seq.*)

Upon appeal to the Supreme Court of the Territory this judgment was affirmed (Opinion Supreme Court. Rec., 117 *et seq.*) and appellant prosecutes this further appeal to this court.

I.

THIS COURT WILL ACCEPT THE FACTS AS FOUND BY THE SUPREME COURT OF ARIZONA IN ITS OPINION.

San Pedro v. *United States*, 146 U. S., 130.

II.

A TITLE ACQUIRED BY A MORTGAGOR AFTER THE EXECUTION OF A MORTGAGE INURES TO THE BENEFIT OF THE MORTGAGEE, AND IS SUBJECT TO FORECLOSURE. AND SUBSEQUENT PURCHASER FROM THE MORTGAGOR UNDER HIS AFTER-ACQUIRED TITLE STANDS IN NO BETTER POSITION THAN THE MORTGAGOR.

2nd Story Eq., 1201a.

1st Jones Mortgages, 679.

III.

THE DISTRICT COURT OF ARIZONA IN THE FORECLOSURE PROCEEDINGS INSTITUTED BY ROBERTS HAD JURISDICTION OF THE SUBJECT-MATTER AND FOUND AS A FACT THAT THE DEFENDANTS HAD BEEN SERVED WITH PROCESS. ANY ALLEGED CLAIM MADE BY THEM AS TO THE MINING PROPERTY WAS DETERMINED AND CUT OFF BY THAT DECREE. APPELLANT, A PARTY TO THAT CAUSE, CANNOT ATTACK THAT DECREE IN THIS COLLATERAL PROCEEDING.

Gunn v. *Plant*, 94 U. S., 664.

Grey v. *Brignardello*, 1 Wall., 627.

Kern v. *Strashburger*, 71 Ill., 303.

Pennington v. *Gibson*, 16 How., 74.

Hopkins v. *Lee*, 6 Wheat., 109.

McGoon v. *Scales*, 9 Wall., 23.

Lancaster v. *Wilson*, 27 Gratt., 624.

Jeter v. *Hewitt et al.*, 22 How., 264.

Barton v. *Anderson*, 4 N. E., 422.

Bundy v. *Cunningham*, 8 N. E., 176.

IV.

THE JUDGMENT OF THE REGISTER OF THE UNITED STATES LAND OFFICE, AND THE GRANT OF THE PATENT OF THE POLAND AND HAMILTON MINING CLAIMS TO E. M. DICKEY, GRANTOR OF APPELLEES, WAS JUDICIAL IN ITS EFFECT AND FOREVER TERMINATED THE ALLEGED INTEREST OF APPELLANT IN THE MINING PROPERTY.

Rev. Statutes, U. S., 2325.
Wright v. *Dubois*, 21 Fed., 694.
Steel v. *Smelting Co.*, 105 U. S., 447.
Johnson v. *Towsley*, 13 Wall., 72.

V.

ALL ADVERSE CLAIMS NOT INTERPOSED IN PROCEEDING FOR A PATENT BY REGISTRAR ARE, IN LAW, WAIVED, AND A PATENT IS A COMPLETE AND UNASSAILABLE CONVEYANCE OF THE LEGAL TITLE.

Starr v. *Starr*, 6 Wall., 418.
Silver Bow. Co. v. *Clarke*, 5 Pac., 570.
Paunheim v. *Dahl*, 9 Pac., 892.
Kannagh v. *Quartette Co.*, 27 Pac., 245.
Talbot v. *King*, 9 Pac., 434.
Smelting Co. v. *Kempt*, 104 U. S., 636.
Moore v. *Wilkinson*, 13 Cal., 478.
Hamilton v. *Mining Co.*, 33 Fed., 562.
Ferry v. *Street*, 11 Pac., 576.
Nor. Pac. Ry. Co. v. *Cannon*, 4 C. C. A., 303.

VI.

UNDER THE SHERIFF'S DEED ROBERTS WENT INTO POSSESSION OF THE ENTIRE MINING CLAIM. HIS POSSESSION WAS OPEN, ADVERSE AND HOSTILE. THEREFORE DICKEY, GRANTEE, WAS NOT A CO-TENANT WITH APPELLANT.

Unger v. *Mooney*, 63 Cal., 586.
Freeman on Co-Tenancy, Sec. 162.

VII.

EVEN IF DICKEY WAS A CO-TENANT, YET HIS APPLICATION FOR A PATENT AND THE ISSUANCE THEREOF TO HIM ADVERSE TO APPELLANT'S CLAIM, PUT AN END TO THAT RELATIONSHIP.

Tabor v. *Sullivan*, 12th Colo., 136.
Freeman on Co-Tenancy, Sec. 221.
Mining Co. v. *Mining Co.*, 3 Saw., 634.
Jackson v. *Huntington*, 5 Pet., 41.
Goeway v. *Urig*, 18 Ill., 238.
Hinkley v. *Greene*, 52 Ill., 223.
Ball v. *Palmer*, 31 Ill., 370.
Puckett v. *McDaniels*, 28 S. W., 360.
Frederick v. *Gray*, 10 S. & R., 182.
Van Gunden v. *G. V. & V.*, 52 Fed., 838.

VIII.

THE PATENT ISSUED TO DICKEY CANNOT BE ATTACKED COLLATERALLY; BUT ONLY BY DIRECT PROCEEDINGS INSTITUTED BY THE GOVERMENT OR PARTIES ACTING IN ITS NAME AND BY ITS AUTHORITY.

Lee v. *Johnson*, 116 U. S., 48.
Carter v. *Thompson*, 65 F. R., 329.
Poire v. *Wells*, 6 Colo., 406.
Green v. *Barker*, 66 N. W., 1032.

IX.

APPELLEES ARE BONA FIDE PURCHASERS, WITHOUT NOTICE, AND PURCHASED UPON A TITLE RECORD WHICH SHOWS THE TITLE IN DICKEY OF ALL THESE MINING CLAIMS AND THAT HE HAD RECEIVED THAT TITLE BY PATENT FROM THE UNITED STATES. THIS TITLE IS UNASSAILABLE.

Tiedman on Real Property, 817.

X.

APPELLANT IS BARRED BY THE FIVE YEARS STATUTE OF LIMITATIONS OF ARIZONA.

Revised Statutes of Arizona (1887), Title XLIV, Sec. 2299, p. 405.

XI.

INDEPENDENT OF THE STATUTE THE LACHES OF APPELLANT PRESENTS AN INSUPERABLE DEFENSE TO HIS CLAIM.

Galliher v. *Cadwall*, 145 U. S., 368.

Penn Mutual Life Ins. Co. v. *Austin*, 168 U. S., 685.

Speidel v. *Henrici*, 120 U. S., 377.

Hammond v. *Hopkins*, 143 U. S., 224.

Twin Leek Oil Co. v. *Marbury*, 91 U. S., 587.

Willard v. *Wood*, 164 U. S., 502.

ARGUMENT.

At the time we send this to the printer (December 15) we are advised by the clerk of this court that no brief has been filed herein for appellant; but we assume if any argument is made by his learned counsel it will be substantially the same as that addressed to the Supreme Court of Arizona.

I.

THE DECREE OF THE DISTRICT COURT OF ARIZONA OF DECEMBER 15TH, 1886, IN A CAUSE WHEREIN THE COURT HAD JURISDICTION OF SUBJECT-MATTER AND PARTIES, INCLUDING APPELLANT THOMPSON, A PARTY DEFENDANT, ADJUDGING THAT THE ALLEGED INTEREST OF THE APPELLANT IN THE MINING PROPERTY IN QUESTION WAS SUBJECT TO THE ROBERTS MORTGAGE, AND SHOULD BE FOREVER FORECLOSED BY SUCH DECREE, PRESENTS AN INSUPERABLE BAR TO THE PRESENT ATTEMPT OF THOMPSON IN THIS COLLATERAL SUIT TO RE-ESTABLISH THE CLAIM WHEREOF HE WAS IN SAID CAUSE JUDICIALLY DIVESTED.

As to Schofield and appellant Thompson, the complaint in the foreclosure suit expressly averred that "they claim some interest, by purchase or otherwise, in and to said mortgaged premises; that whatever of interest or claim they or either of them may have in or to said mortgaged premises was acquired by them and each of them after the making and recording of said mortgage, as aforesaid, and is subsequent and subject thereto."

The prayer of the complaint with reference to Schofield and Thompson was that the interest or claim of each

of them to said mortgaged premises be decreed subject to the mortgage, and that the defendant and each of them and all persons claiming under them or either of them, be barred and forever foreclosed "of all right, claim or equity of redemption in said premises."

Proper service was had on all defendants. Jurisdiction of the subject-matter and parties was unquestioned. All defendants made default, and on December 15, 1886, the District Court, after adjudging in favor of plaintiff Roberts and against the defendants Collins as to the debt, it decreed that the mortaged premises be duly sold. The District Court further found and decreed that the interests of Schofield and Thompson in the Poland and Hamilton mining claims were subsequent and subject to the mortgage, and that they should be "forever barred and foreclosed of and from all equity of redemption and claim in, of and to said mortgaged premises and every part thereof from and after the delivery of the sheriff's deed." The decree then describes the "mortgaged premises" as the two *entire* mining claims known as the Hamilton and Poland, and directs the sale of the entire property in satisfaction of the mortgage debt. Under that decree the entire property was sold, and, by deed of the sheriff, conveyed to Roberts.

No appeal was ever taken from the decree. It stands as a positive adjudication that on October 25, 1883, M. E. Collins was the owner of an undivided one-half interest in the Poland and Hamilton mining claims; that on that day he executed a mortgage of the property to John M. Roberts; that thereafter and during the life of the mortgage he acquired the other one-half interest which inured to the benefit of the mortgagee; that the interests which this suit seeks to establish were

the same one-half interest which Collins had subsequently acquired and which inured to the benefit of his mortgagee, and that they were subsequent and subject to the Roberts mortgage, and were forever barred and foreclosed by the proceedings and decree of the District Court of Arizona.

In this collateral proceeding the findings and adjudications in that decree must be accepted as final and conclusive.

Grey v. *Brignardello,* 1 Wall., 627, Bk. 17, Co-op., 697:

> "It is a well settled principle of law, that the decree or judgment of a court, which had jurisdiction of the person and subject-matter, is binding until reversed, and cannot be collaterally attacked. * * *
>
> It is sufficient for the buyer to know that the court had jurisdiction and exercised it, and that the order, on the faith of which he purchased, was made and authorized the sale. With the errors of the court he has no concern. These principles have so often received the sanction of this court, that it would not have been necessary again to reaffirm them, had not the extent of the doctrine been questioned at the bar."

In *Pennington* v. *Gibson,* 16 How., 74, Book 14 Co-op., 851-2, the court said:

> "We hold no doctrine to be better settled than this, that whenever the parties to a suit and the subject in controversy between them are within the regular jurisdiction of a court of equity, the decree of that court solemnly and finally pronounced, is to every intent as binding as would be the judgment of a court of law, upon parties and their interests regularly within its cognizance. * * *
>
> Hence a verdict and judgment of a court of record, or a decree in chancery, although not binding on strangers, puts an end to all further controversy concerning the points decided between the parties to

such suit. In this there is and ought to be no difference between a verdict and judgment in a court at law and a decree of a court of equity. They both stand upon the same footing, and may be offered in evidence under the same limitations; and it would be difficult to assign a reason why it should be otherwise. The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it, an end could never be put to litigation.' "

See also

McGoon v. *Scales*, 9 Wall., 23.
Black on Judgments, Sec. 245.
Lauearter v. *Wilson*, 27 Gralt., 624.
Jeter v. *Hewett*, 22 How., 264.
Cody v. *Hough*, 20 Ill., 43.
Kem v. *Strausberger*, 71 Ill., 303.

There is no doubt as to the jurisdiction of the District Court to make the findings and adjudications embraced in its decree. Defendant Schofield was personally served and Collins and Thompson were brought in by publication, pursuant to statute and by service of a copy of the complaint. Moreover, the District Court found as a fact and adjudged that all of the defendants were regularly served and that it had jurisdiction over them. This is conclusive in all collateral inquiries.

Black on Judgments, Sec. 274, and cases cited.

There is likewise no doubt as to the jurisdiction over the subject-matter. The suit was to foreclose a mortgage upon all the right, title and interest of Collins in the Poland and Hamilton mining claims. The determination of the extent and scope of that interest was directly presented to the court in the complaint, the allegation being

that the interest of Schofield and Thompson was subject to the mortgage, and the prayer was that their interest might be divested and barred by the decree. It was therefore proper and necessary for the court to determine whether such interests were prior or subsequent, within or without the mortgage; whether they were made at a time and under circumstances to be barred and determined by the decree; and the court found and adjudged that the interests of these defendants were subject to the mortgage and should be barred. The presumption is that all lawful evidence was heard justifying this finding and conclusion.

Again, it was a default decree.

In the case of *Barton* v. *Anderson*, 4 N. E. R., 422, which is peculiarly apt, because of the similarity of the facts in this case, the court said:

> "As applicable, however, to a suit to foreclose a mortgage, and other kindred suits in the nature of a proceeding *in rem*, where a party is made a defendant to answer as to his supposed or possible, but unknown and undefined interest in the property, we think that, as against him, a default ought to be construed as an admission that, at the time he failed to appear as required, he had *no* interest in the property in question, and hence as conclusive of any prior claim of interest or title adverse to the plaintiff. Any less rigid rule of construction might, and in many cases doubtless would, defeat the very object properly had in view in making the party a defendant to answer as to his supposed or possible interest in the property involved, to the end that all claims to or against such property might be adjusted by the final judgment or decree, and further litigation thereby avoided."

The decree of the District Court being *res adjudicata* upon every question therein litigated and determined, no court, in a collateral proceeding, is concerned with the

facts which pre-existed the decree. Appellees, when they purchased the property, were not required to look beyond its findings and adjudications. That decree being unreversed imports absolute verity, and in itself furnishes a sure foundation and defense to the title of appellees in the entire mining property in question.

II.

THE FACT THAT DICKEY RE-LOCATED THE ENTIRE CLAIMS IN HIS OWN NAME IN 1891, AND APPLIED TO THE REGISTRAR OF THE LAND DEPARTMENT AND OBTAINED A PATENT TO BOTH CLAIMS, IS CONCLUSIVE AGAINT APPELLANT'S INTEREST IN THIS SUIT. THE ACTION OF THE LAND DEPARTMENT IS QUASI JUDICIAL, AND IT HAVING ADJUDGED TITLE AND RIGHT TO PATENT IN DICKEY, THAT JUDGMENT IS FINAL.

Dickey asserting title in himself to both claims, took the necessary steps to entitle him to a patent, and the Land Department found that the facts entitled Dickey to such patent and granted the same to him.

This Honorable Court, in *Smelting Co.* v. *Kemp*, 104 U. S., 636, speaking as to the effect of the judgment of the officers of the Land Department in granting a patent, say:

> "Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to

> which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief, indeed its only, value, as a means of quieting its possessor in the enjoyment of the lands it embraces."

That all adverse claims not interposed under the statute are, in law, waived, and that the patent is an unassailable conveyance of the legal title to the patent, see

Wright v. *DeBois*, 21 Fed., 894, 695, 696.
Stark v. *Starrs*, 6 Wall., 418.
Silver Bow Co. v. *Clarke*, 5 Pac., 570.
Raunheim v. *Dahl*, 9 Pac., 892.
Kannagh v. *Quartette Co.*, 27 Pac., 245.
Talbot v. *King*, 9 Pac., 434.
Moore v. *Wilkinson*, 13 Cal., 478.
Hamilton v. *Mining Co.*, 33 Fed., 562.
Ferry v. *Street*, 11 Pac., 576.
Nor. Pac. Ry. Co. v. *Cannon*, 4 C. C. A., 303.

But we assume that the learned counsel for appellant will invoke this doctrine:

> "It is well settled that co-tenants stand in a certain relation to each other of mutual trust and confidence; that neither will be permitted to act in hostility to the other in reference to the joint estate; and that a distinct title acquired by one will inure to the benefit of all. A relaxation of this rule has been sometimes admitted in certain cases of tenants in common who claim under different conveyances and through different grantors."

And it is amply supported in

Brundy v. *Mayfield*, 38 Pac. Rep., 1070.
Hunt v. *Patchin*, 35 Fed. Rep., 816.

And by possibly the latest expression of this court on the subject in

Turney v. *Sawyer,* 150 U. S., 578.

But the facts which justify the application of this doctrine are not present in this record. Dickey at the time he applied for and obtained the patent was in no sense a co-tenant with appellant. No relation of trust and confidence incident to a co-tenancy existed between them.

When Thompson took his one-fourth interest in the property he became a co-tenant with Collins; but by foreclosure proceedings he was ousted and Roberts went into full ownership and absolute, exclusive, and adverse possession, of all of which appellant was chargeable with notice. All relation of co-tenancy then ceased. Dickey by purchase received title from Roberts' estate, and in July, 1891, acting as sole owner, entered into absolute, exclusive, adverse and hostile possession, made improvements, did assessment work, paid taxes, relocated, took initial steps to obtain patent and sold and conveyed part of the mining property to other purchasers. The foreclosure and sale by the sheriff of the whole claim dissolved relation of co-tenancy and disseized appellant and Schofield. Dickey, when he purchased did not become a co-tenant of either of them, and no trust attached to him as a purchaser.

Freeman on Co-tenancy, Sec. 162.

It is a clear rule of law, applicable alike to all real property, that a conveyance of a whole tract of land by one of several tenants in common, holding the tract, followed by adverse possession of the purchaser, amounts to an ouster or disseizin of the co-tenants.

Hinckley v. *Green,* 52 Ill., 230.

Tiedeman on Real Property, Sec. 251.

But assuming that Dickey was at one time a co-tenant with appellant, the various acts hereinbefore shown by him clearly indicating his adverse possession, with hostile intent, put an end to any relation of trust, and when Dickey applied for and obtained a patent he bore no such relation. The interests were then distinctly adverse, and being adverse it was appellant's duty to interpose and oppose the issuing of a patent to Dickey by the Registrar of the Land Office.

Tabor v. *Sullivan,* 12 Col., 136, 20 Pac., 437.
Mining Co. v. *Bullion Mining Co.,* 3 Saw., 634.

That the foreclosure proceedings, the sheriff's deed to the whole tract executed to Roberts, the entry into exclusive and adverse possession of the whole tract by Roberts, the transfer from the estate of Roberts to Dickey of the whole tract, the entry of Dickey into the exclusive and adverse possession, the operation by him of the mining property as sole owner, the relocation of the entire property by Dickey in his own name, and the other facts present in this record as conclusively found by the Supreme Court of Arizona, operated as a disseisin of the holders of the Thompson interest, if at any time a co-tenancy existed, and forever dissolved any relation of trust and confidence incident to a co-tenancy, and established the adverse character of the possession of Dickey at the time he applied for the patent so as to require the holders of the Thompson interest to adverse in the proceedings for the patent, or forever lose their rights, we refer this Honorable Court, in addition to the aforecited authorities, to the cases following:

Pluckett v. *McDaniel,* 28 S. W. Rep., 360.
Vangunden v. *C., V. & V.,* 52 Fed., 838.

Jackson v. *Huntington*, 5 Pet., 41.
Mining Co. v. *Mining Co.*, 3 Saw., 634.
Geowy v. *Urig*, 18 Ill., 238.
Fredericks v. *Gray*, 10 S. & R., 182.

For a full discussion of what constitutes disseisin and ouster in reference to co-tenants, see

Freeman on Co-tenancy, Secs. 221-2-3 and 228.

III.

But if the interest of appellant was not terminated by the foreclosure decree or patent, it is barred by the statute of limitations.

The Territorial statutes of limitation, so far as applicable, are as follows:

Par. (2297): "Every suit to be instituted to recover real property as against any person in peaceable and adverse possession thereof, under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards."

Par. (2298): "By the term title is meant a regular chain of transfer from or under the sovereignty of the soil, and by color of title is meant a consecutive chain of transfer down to such person in possession without being regular, as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing."

Par. (2299): "Every suit to be instituted to recover real property as against any person having peaceable and adverse possession thereof, cultivating, using or enjoying the same and paying taxes thereon, if any, and claim under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued, and not afterwards."

The District Court of Arizona found that the claim of appellant was barred by the five years statute of limita-

tions, and in that conclusion the Supreme Court of the Territory concurred.

> "Courts of equity in general recognize and give effect to the statute of limitations as a defense to an equitable right, when at law it would have been properly pleaded as a bar to a legal right."
>
> *Moran* v. *Horsly*, 178 U. S., 214.

The trial court found as an ultimate fact that "defendants for five years before suit filed—October 6, 1896,—had been in open, notorious, exclusive, peaceable and adverse possession of both the Poland and Hamilton mining claims, and plaintiff was barred by the statute of limitations."

Touching this finding the Supreme Court of Arizona says, in its opinion (Rec., 122):

> "The assignments of error relate principally to the finding of the court upon the statute of limitations, in which we think the District Court was logically correct in its conclusions."

It is therefore an ultimate fact conclusively found in the case that appellees and their grantors were in the open, notorious, peaceable, exclusive and adverse possession of the mining property in question for over five years prior to the institution of this suit. That finding this court will not review.

San Pedro v. *U. S.*, 146 U. S., 130.

But if this Honorable Court should review the evidence, a brief reference to the pertinent facts will abundantly sustain the conclusion of the Supreme Court of Arizona. The Roberts mortgage was executed on October 25, 1883. The decree of foreclosure of that mortgage was rendered on December 15, 1886. In that decree the entire property

was sold to Roberts, and he duly received the deed of the sheriff of the entire property on September 30, 1887. On July 20, 1891, the administrator of the estate of Roberts conveyed the property to E. M. Dickey. On December 14, 1891, Dickey made a re-location of the mining claims in his own name. All this occurred five years before the institution of the present suit. It further appears in evidence (Rec., 122) that the present appellant, after an abortive attempt to operate the property abandoned it in the year 1885, and that since that time until the institution of the present suit appellant Thompson did nothing towards the operation of the property or for the assertion of any interest by him therein. Upon the execution of the Roberts deed to Dickey, Dickey immediately entered into the exclusive, adverse, open and notorious possession, publicly re-located the property in his own name and took the open and public proceedings to secure a patent to the entire property. The testimony clearly sustains the findings of the District Court confirmed by the Supreme Court of the Territory that the possession of the appellees and their grantors was so open, notorious, adverse and exclusive for five years prior to the institution of the suit that the bar of the statute of limitations operated to confirm their title against all persons forever.

The general rule as to whether a title of a co-tenant becomes adverse, is clearly stated in *Unger* v. *Mooney*, 63 Cal., 591, as follows:

> "Now, the possession of one tenant in common is the possession of his co-tenant. Such possession by one tenant has no element of hostility to the right of his co-tenant. The co-tenant out of possession is not informed by such possession that it has any adverse character. Such possession under claim of title adverse to the co-tenant, but not manifested to

him by the conduct of the possessor of a character to notify the co-tenant of its adverse nature, is not sufficient to set the statute of limitations in operation as between tenants in common. *The co-tenant must in some way be notified of the adverse holding, in order to be prejudiced by it.* This may be by actual notice, or by acts of declaration so open and notorious that it may be inferred that the co-tenant had knowledge of them. * * * The adverse character must in every case be manifested to the owner. The owner must be notified in some way that the possession is hostile to his claim or the statute does not operate on his right. * * * Hence, a notorious and open occupation with hostile intent is a necessary constituent of an adverse possession. Neither a hostile intent without such occupation, nor such occupation without hostile intent, is sufficient."

It is difficult to see what could have been done by Dickey to more clearly indicate that his possession was hostile and adverse, and equally difficult to see what steps could have been taken or proceedings had that more clearly and emphatically notified Thompson, the appellant, that the possession of Dickey was exclusive and adverse. Thompson knew of the foreclosure proceedings; he knew of the decree of sale of the entire property; he knew of the purchase of the entire property by Roberts and the issuance of the sheriff's deed; he knew of the adverse possession of Roberts and the expenditures made by him for assessment work; he knew of the sale by Roberts to Dickey, and the immediate entry by Dickey into open and exclusive possession. He is charged with the knowledge of the re-location of the property by Dickey in his own name. He was certainly notified that the possession of Dickey was exclusive and adverse, and with full knowledge of his supposed rights he waited for five years before seeking to re-establish his supposed interest in the mining property.

IV.

BUT ASIDE FROM THE STATUTE OF LIMITATIONS, THE SUPPOSED RIGHTS OF APPELLANT ARE BARRED BY HIS LACHES.

The Supreme Court of Arizona applied the doctrine of laches to the conduct of appellant, and concluded that he "is estopped from now asserting that he is a co-tenant, and that appellees are trustees of the title for his use." It is difficult to present a clearer case of laches than is presented by this record. And the law is clear that where mining property is the subject of controversy the duty of exercising diligence in the assertion of an equitable right is especially peremptory.

Johnson v. *Standard Mining Co.*, 148 U. S., 360.

Twin Lick Oil Company v. *Marbury*, 91 U. S., 587.

The facts convincingly showing that appellant was guilty of the grossest laches, are summarized in the opinion of the Supreme Court of Arizona, pages 122 and 123 of the Record. The appellant practically abandoned the property in 1885, and from 1885 to the time of the institution of this suit, over ten years later, he did nothing to assert his interests in the property. Silently and without any excuse he stood by and saw the Roberts mortgage foreclosed on the entire property, the deed of the sheriff to Roberts, the payment by Roberts for assessment work, the sale by the estate of Roberts to Dickey. He saw Dickey, supposing himself the sole owner, enter into exclusive possession, improving the property and re-locating it in his own name. He saw Dickey in the belief of

unquestioned ownership of the entire property, applying for and obtaining a United States patent. He knew that the patent was recorded, and on its face gave out to the world notice that Dickey was the sole owner. He stood by while Dickey sold to innocent purchasers for valuable considerations. He saw those innocent purchasers come into exclusive possession and improve and operate the property. He permitted appellees to expend $30,000 in improvement and development work. He permitted appellees to do tunnel work on the property to the extent of 2,000 feet. Yet, without any excuse, or pretense of justification, the appellant from 1886 to 1896 remained wholly silent as to any interest he may have believed he held in these mining properties.

In *Twin-Lick Oil Co.* v. *Marbury,* 91 U. S., 587, this Honorable Court speaks of the inequity of permitting a party who supposes himself to have a title in property of a fluctuating value, such as mining property, to stand by and see others invest in and improve the property, and then, after it has proved a success, step forth and assert his claim.

In *Evans* v. *Watson,* 156 U. S., 527, a case involving the application of the doctrine of laches, this court said:

> "Their delay of four years, during which much of the property has been sold, presumptively to parties who have purchased without notice, is fatal to their claim."

There is nothing in the claim, and especially nothing in the conduct of appellant that should induce this Honorable Court to relax in the slightest measure the salutary doctrine of laches, and there is much in the record to warrant the belief that appellant was wilful in his long inaction and silence, allowing appellees to improve and de-

velop the mines, intending to step forward and assert his interest when the property by their means and efforts was made a success.

Disregarding, then, the foreclosure decree, the patent to Dickey, and accrual of the statutory bar, I am confident that this Honorable Court is not at all likely to sanction such conduct on the part of appellant as this record discloses.

Respectfully submitted.

G. W. KRETZINGER,
Solicitor for Appellees.

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Sup. Ct. Exs. of Kretzinger for Appellees

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144

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

B. F. THOMPSON, *Appellant,*

vs.

D. M. FERRY, SIMON J. MURPHY AND CHARLES C. BOWEN, *Appellees.*

Appeal from the Supreme Court of the Territory of Arizona.

SUPPLEMENTAL BRIEF FOR APPELLEES PREPARED AFTER SERVICE OF COPY OF BRIEF FILED IN BEHALF OF APPELLANT.

G. W. KRETZINGER,
SOLICITOR FOR APPELLEES.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1900.

B. F. THOMPSON, *Appellant,* vs. D. M. FERRY, SIMON J. MURPHY AND CHARLES C. BOWEN, *Appellees.*	Appeal from the Supreme Court of the Territory of Arizona.

Supplemental Brief for Appellees prepared after service of copy of brief filed in behalf of Appellant.

MAY IT PLEASE THIS HONORABLE COURT:

Since the dictation and filing of our former brief in behalf of the appellees, we have seen for the first time the argument filed in behalf of appellant.

Touching the contentions there made for reversal of the judgment of the Supreme Court of the Territory, we beg leave briefly to submit:

I.

The learned counsel contends that the statute of limitation applied by the Supreme Court of Arizona is not applicable where the property involved is a mining claim.

For this contention no authority is cited.

Section 2,308 of the Revised Statutes of Arizona of 1887 seems to deprive the contention of all weight. It is there provided, in express words, that the words "real property" are to be "taken to mean mines and mining claims."

II.

The learned counsel further contends that the statute of limitations is inapplicable, because title by adverse possession under the statutes of Arizona can be acquired only to 160 acres; that this Honorable Court will take judicial notice that the two mining claims involved contain more than 160 acres. Counsel obviously misread the statute in making this contention. Section 2,300 of the Revised Statutes of Arizona distinctly provides that where possession is taken and held under a written memorandum of title other than a deed, which fixes the boundaries of the possessor's claim and is duly registered, such peaceable possession shall be construed to be *co-extensive* with the boundaries specified in such instrument.

Here Dickey re-located these mining claims in his own name, and duly registered his location papers; he obtained a patent in his own name. All this occurred three years before the institution of this suit. He and his grantees held peaceable and adverse possession of the claims unquestionably under color of title. That possession cannot be disturbed unless suit is instituted within three years. (Sec. 2,297.)

Bicknell v. *Comstock*, 113 U. S., 149.

III.

The learned counsel further contends that the statute of limitations is inapplicable because the relation of trustee and *cestui que trust* existed between the appellant, Thompson, and Dickey and his grantees.

It may be conceded that the statute of limitations does not bar the enforcement of an express and formal trust, but this record conclusively shows that no trust relation ever existed between the appellees and their grantor and appellant. Dickey took under a deed of the entire property made by Lowry, administrator, to him on July 20, 1891. If, before that date, any relation of co-tenancy existed, that deed of the entire property by Lowry extinguished the relation. Dickey entered into full possession as sole owner co-extensive with his deed. His possession from the first was attended with an assertion of full ownership, and, as to Thompson, was *ab initio* openly adverse, hostile, and exclusive. As sole owner he re-located the entire property to both claims in his own name, posted and registered notices, publicly applied for a patent, and publicly received the patent to both claims. As sole owner he possessed, operated and developed the entire property. For more than ten years prior to this suit, appellant Thompson had no more to do with the property than an utter stranger. He exercised no right of ownership, shared no expense, served no notice, never had communication, relation or dealing with Dickey, to whom he was an utter stranger, in any form whatsoever. It is clear, therefore, that no recognized relation of co-tenancy and no express trust ever existed between Dickey and the appellant.

The suit of appellant is clearly one to establish a constructive trust, and to such a suit the statute of limitations is a complete bar.

Spidel v. *Henrici*, 120 U. S., 377.

Merrill v. *Monticello*, 66 Fed., 165, and authorities there cited.

But independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them.

Spidel v. *Henrici*, 120 U. S., 377.

IV.

The learned counsel contends that appellant had no notice that the possession of Dickey was adverse.

Both the District Court and the Supreme Court of Arizona found and concluded from the evidence that Thompson had both actual and constructive notice of the acts establishing the adverse character of the possession of Dickey and his grantees. Such knowledge may be derived from "actual notice or by acts or declarations so open and notorious that it may be inferred that the co. tenant had knowledge of them."

Unger v. *Mooney*, 63 Cal., 591.

V.

No authority cited by appellant affords reason for the reversal of this decree.

Zeller v. *Eckert*, 4How., 289, sustains our contention that the statute of limitations begins to run at the time the evidence raises an adverse possession (page 295), and the adverse possession is established by acts "*open, continued* and *notorious*, so as to preclude all doubt as to the character of the holding, or the want of knowledge on the part of the owner."

Is it possible to imagine acts of adverse possession more "open, continued and notorious" than those which this record discloses?

In *Hunt* v. *Patchin*, 35 Fed., 816, there was no intimation that the defendant denied the existence of the relation of co-tenancy, and did nothing establishing the character of an adverse possession.

In *Mining Co.* v. *Taylor*, 100 U. S., 37, there was no adverse possession on the part of the co-tenant prior to the commencement of the two years, the limitations specified in the Nevada statute.

Moreover, in that case the plaintiff was a foreign corporation and therefore not entitled to the benefit of the Nevada statute of limitations.

It will be observed also that this Taylor case is a conclusive answer to the learned counsel's contention as to the inapplicability of the statute of limitations. There the court clearly holds that the statute begins to run as soon as the possession becomes openly adverse, as in the case at bar.

The point decided in *Turner* v. *Sawyer*, 150 U. S., 578, that the lienholder was nor a co-owner within the meaning of section 2,324 of the revised statutes, so as to entitle him to "advertise out" the other parties in interest, has no application to the case at bar.

In *McClaskey* v. *Barr*, 47 Fed., 154, it was held that the defendant was entirely without notice of any act on the part of his co-tenant indicative of an adverse or hostile possession.

The pertinent facts in *McClaskey* v. *Barr* are more fully stated in 42 Fed., 609, where the question of the statute of limitations was considered. It appears that the defendant never did anything "indicating a claim to the entire estate and intention to hold adversely," except to construct some improvements. But more than this, it appears that the recorded deeds to the defendants recognized the co-tenancy and subsequent deeds from the co-tenants to the defendants contained "recitals recognizing in express terms the co-tenancy." (p. 616.) In this situation the Circuit Court in that case properly concluded:

> "The admitted facts, as they appear from the pleadings, cannot be reconciled with the proposition that there has been an adverse possession so open, continued and notorious 'as to preclude all doubt of the character of the holding or the want of knowledge on the part of the owner,' which is what the Supreme Court in *Zeller's Lessee* v. *Eckert* declared to be necessary."

In the case at bar Dickey did everything that could be done indicative of a hostile and adverse possession, and of everything done appellant was cognizant.

Respectfully submitted.

G. W. KRETZINGER,
Solicitor for Appellees.

171

No. 144.

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Brf. of Kretzinger for Appellees.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

B. F. THOMPSON, *Appellant*,
vs.
D. M. FERRY, SIMON J. MURPHY AND CHARLES C. BOWEN, *Appellees.*

Appeal from the Supreme Court of the Territory of Arizona.

MOTION OF APPELLEES TO AFFIRM JUDGMENT FOR WANT OF A STATEMENT OF FACTS IN THE NATURE OF A SPECIAL VERDICT.

G. W. KRETZINGER,
SOLICITOR FOR APPELLEES.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

B. F. THOMPSON, *Appellant,* *vs.* D. M. FERRY, SIMON J. MURPHY AND CHARLES C. BOWEN, *Appellees.*	Appeal from the Supreme Court of the Territory of Arizona.

Motion of Appellees to Affirm Judgment for want of a Statement of Facts in the nature of a Special Verdict.

Come now the appellees, D. M. Ferry, Simon J. Murphy and Charles C. Bowen, by G. W. Kretzinger, their solicitor, and respectfully move this honorable court to enter a judgment of affirmance herein, because:

1. The Supreme Court of Arizona did not make or certify a statement of facts in the nature of a special verdict herein.

2. There is no error assigned on the rejection or admission of evidence.

G. W. KRETZINGER,
Solicitor for Appellees.

MAY IT PLEASE THIS HONORABLE COURT:

In support of the foregoing motion, we direct the attention of the court to the so-called statement of facts appearing on pages 130 and 131 of the transcript. It is not in compliance with the act of April 7, 1874, C. 80, S. 2, 18 Stat., 27, 28.

The Supreme Court of the Territory "takes the facts as certified * * * in the original papers in said cause, to wit: the judgment roll, * * * the minute entries in said cause, * * * together with *the findings of fact in the court below*, the motion for a new trial, and *the reporter's transcript of the evidence taken on the trial of said cause*, all certified to by said clerk of said District Court as being the whole of the record of said cause."

The District Court made no statement of facts in the case. It filed a written opinion, appearing on pages 104 to 112 of the transcript; but narration of facts in an opinion is not "a statement of facts in the nature of a special verdict" required by the statute.

Saltonstall v. *Burtwell*, 150 U. S., 417.

Nor is the record aided by the fact that the territorial Supreme Court incorporates in its certified statement of the case, so-called, all the evidence introduced by the parties. The statute requires not a mere report of the evidence, but a statement of the ultimate facts which such evidence establishes.

Norris v. *Jackson*, 9 Wall., 125.
Lehren v. *Dickson*, 148 U. S., 71.

The juisdiction of this court on an appeal from the Supreme Court of the Territory is derived from and limited by the statute. Under the statute the court has no power to examine the evidence to ascertain what the facts were, and in the absence of a certified statement of facts in the nature of a special verdict, there is nothing before the court from which it can judicially derive knowledge of the facts upon which the judgment proceeded. It must therefore assume that the evidence sustains the judgment.

Marshall v. *Burtis*, 172 U. S., 630.

Appellant having failed to comply with the statute in perfecting his appeal, the judgment should be affirmed.

Respectfully submitted.

G. W. KRETZINGER,
Solicitor for Appellees.

Supreme Court of the United States.

No. 144.—October Term, 1900.

B. F. Thompson, Appellant,
vs.
D. M. Ferry, Simon J. Murphy and Charles C. Bowen.

Appeal from the Supreme Court of the Territory of Arizona.

[March 18, 1901.]

The Chief Justice: This appeal being from the judgment of a Territorial court, and no errors having been assigned on exceptions to rulings on the admission or rejection of testimony, we are limited in our review to the determination of the question whether the facts found are sufficient to sustain the judgment rendered. *Gildersleeve* v. *New Mexico Mining Company*, 161 U. S. 573; *Harrison* v. *Perea*, 168 U. S. 311; *Marshall* v. *Burtis*, 172 U. S. 630.

The opinion of the trial court sets forth facts on which it proceeds, but there are no specific findings as such.

In the Supreme Court the statement of facts is as follows:

"Statement of facts by the Supreme Court of the Territory of Arizona, sitting as a court of appeal, on the foregoing transcript on appeal from the district court of the fourth judicial district of the Territory of Arizona in and for the county of Yavapai, wherein judgment was rendered on a full hearing of the case in said district court in favor of said appellees and against the said appellant, as appears from the complete record of said cause now on file in this court, and which said judgment has been brought to this court on appeal by appellant herein.

"The Supreme Court of the Territory of Arizona takes the facts as certified to by the clerk of the said district court of Yavapai County, Arizona Territory, as found in the original papers in said cause, to wit, the judgment roll, and forwarded by the said clerk and now on file in the office of the clerk of this court; also the minute entries in said cause, certified to by said clerk of said district court, together with the findings of facts of the court below, the motion for a new trial, and the reporter's transcript of the evidence taken on the trial of said cause below, all certified to by said clerk of said district court as being the whole of the record of said cause, and also the assignment of errors filed by appellant herein and contained in his brief on file herein, and the facts shown by the whole record herein as the facts shown in this cause and makes the same the statement of facts as found in the transcript in this cause the facts as found in this case.

"That from such transcript and from the same as the statement of facts herein this court finds that the said district court did not commit error in

rendering judgment against the said appellant and in favor of said appellees; that the said appellees were the owners of all the right, title and interest in the Poland and Hamilton mining claims, free from any claim of appellant.

"And the Supreme Court further finds that the judgment of the said district court should be affirmed, and therefore affirms the same."

This is not in compliance with the statute in that behalf, and as we must assume that the evidence sustained the judgment, that judgment is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.